Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

ROBERT HUNTER,

Respondent.

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court, Middle District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of Pennsylvania erred by affirming the judgment of the Superior Court of Pennsylvania which reversed the trial court's decision that the respondent was not denied a trial by an impartial jury under the Sixth Amendment of the Constitution of the United State of America?

II. Whether the Supreme Court of Pennsylvania erred by affirming the judgment of the Superior Court of Pennsylvania which conflicts with *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) and subsequent United States Courts of Appeals cases?

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CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Title 28 U.S.C. § 2101(d) states that "the time for appeal or application for writ of certiorari to review the judgment of a state court in a criminal case shall be prescribed by rules of the Supreme Court." Supreme Court of the United States Rule 13 provides:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the clerk within 90 days after entry of the order denying discretionary review.

On May 6, 1998, the Supreme Court of Pennsylvania denied the petitioner's Petition for Allowance of Appeal from the September 9, 1997 Judgment of the Superior Court of Pennsylvania which remanded the case to the trial court for a hearing. On November 20, 1997, the Superior Court of Pennsylvania denied the petitioner's application requesting Reargument/ Reconsideration of the September 9, 1997 Judgment. On November 14, 1996, the trial court ordered that the respondent's Motion for New Trial based on the respondent's claim that he was deprived his right to a trial by a fair and impartial jury was without merit following a September 23, 1996 evidentiary hearing in the trial court.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

Amendment VI of the Constitution of the United States of America:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense.

CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

On June 9, 1995, following a trial by jury, the respondent was convicted of two counts of involuntary deviate sexual intercourse, three counts of indecent assault, three counts of corruption of a minor, and, three counts of endangering the welfare of children. On September 27, 1995, the respondent was sentenced to an aggregate term of incarceration of eight (8) to sixteen (16) years to be served in a state correctional institution. In the respondent's concise statement of matters complained of on appeal filed pursuant to the trial court's order to do so under Pa. R. App. Proc. 1925(b), the respondent alleged, *inter alia*, that juror No. 5, Samuel H. Snyder, failed to affirmatively answer the following question posed to the jury panel at *voir dire*:

> Have any of you or members of your family or close personal friends have had any experience relating to allegations of child molestation as a victim, witness, or accused.

(N.T., May 30, 1995 at 127), and, that the juror's concealment of personal experience was misconduct which "deprived Mr. Hunter of his constitutionally guaranteed Sixth Amendment Right to a trial by a fair and impartial jury" (Respondent's Statement of Matters Complained of on Appeal filed October 20, 1995 at 1. C.) and prevented the respondent from striking him for cause or by a peremptory challenge. In its February 9, 1996 opinion, the trial court found no merit in respondent's contention that the *voir dire* process was tainted by the juror's alleged omission, that his failure to disclose did not amount to an incorrect answer to a clear question, that the juror's wife and sister-in-law's alleged molestation occurred approximately fifty or more years ago and the question posed referred to allegations of child molestation to which the juror could have interpreted as referring to specific criminal charges. The trial court therefore denied a post-trial hearing on the matter.

The respondent filed a direct appeal to the Superior Court of Pennsylvania. On April 29, 1996 the Superior Court of Pennsylvania affirmed the judgment of sentence but remanded the case to the trial court for a hearing:

> Accordingly, we are constrained to remand to the trial court for a hearing to determine whether juror Snyder knowingly failed to respond to the inquiry during *voir dire*. Absent such knowing deceit, the trial court may conclude that juror Snyder was unbiased and able to render a verdict according to the evidence; *Commonwealth v. Reiss*, 440 Pa. Super. 1151, 655 A.2d 163 (1995), *allo. granted*,

__ Pa. __, 664 A.2d 974 (1995), and that his presence on the petit jury was due to a combination of fortuity and the imprecise or ambiguous nature of inquires framed by counsel during *voir dire.*

Once the possibility of a knowing deceit has been eliminated, appellant may not be permitted to attack the verdict reached by the jury by introducing evidence of discussion which took place during deliberations. Such evidence is not only inadmissible as an invasion of the province of the jury, *Carter v. U.S. Steel Corp.*, 529 Pa. 409, __, 604 A.2d 1010, 1013-14 (1992), *cert. denied,* 506 U.S. 864, 113 S.Ct. 186, 453 121 L.Ed.2d 130 (1992); *Commonwealth v. Pierce,* 453 Pa. 319, __, 309 A.2d 371, 372 (1973), but would demonstrate little more than juror Snyder's analysis of the conduct of T.K. and conveyance of that analysis to other jurors. Such expression during deliberation is quotidian, since it is clear that, despite the best efforts of counsel during *voir dire,* a fair juror, nonetheless, brings untold life experiences to the jury process.

Accordingly, on remand, appellant may present evidence on the limited issue of whether juror Snyder acted with scienter in failing to respond to the inquiry posed during *voir dire.*

---

4. We are, of course, quite mindful of the concern for the privacy of jurors so artfully expressed by the trial court. *See Commonwealth v. Green,* 389 Pa. Super. 518, __, 567 A.2d 724, 733 (1989). Accordingly, the trial court and attorneys, on remand, must be especially careful to safeguard the privacy of jurors whose detached insight and dedication

> plays such a significant role in our criminal justice system. (April 29, 1996 Opinion of the Superior Court of Pennsylvania at 19-21).

On September 23, 1996 an evidentiary hearing was held on remand pursuant to the April 29, 1996 judgment and opinion of the Superior Court of Pennsylvania. Following that hearing at which the juror, Samuel H. Snyder, testified, the trial court, on November 14, 1996, again denied the respondent's motion for new trial based on the lack of *scienter* or intentional deceit of juror Snyder

> After a full hearing and thorough review of this matter, this court finds that Juror Snyder did not fully understand the question posed on *voir dire* and did not believe that it applied to him. As a result, we find that Juror Snyder answered the question honestly and to the best of his knowledge and that he did not knowing fail to respond or knowingly deceive this court during *voir dire*. Furthermore, based upon the very credible testimony given by Juror Snyder, we find that his wife's experiences from long ago did not prevent him from being fair and impartial at Hunter's molestation trial. Moreover, because the evidence presented at trial against Hunter was so overwhelming, this court finds that the integrity of the trial was not impugned in any way. The defendant received a fair trial which lasted almost two weeks; he was convicted by an impartial jury of his peers; and his conviction was affirmed by the Superior Court. Therefore, we find that Hunter has failed to show that this court abused its discretion by denying his Motion for a New Trial. Lastly, we find that justice demands that the young victim in this case not be forced to relive the nightmare of the

> atrocities committed against her by Hunter through yet another agonizing trial. Accordingly, this court's order denying the defendant's request for a new trial should be upheld.
>
> (February 3, 1997 opinion of the trial court).

The respondent filed an appeal to the Superior Court of Pennsylvania from the trial court's denial of his Motion for New Trial. The respondent alleged again that "appellant was deprived of his Constitutional Right to a trial by a fair and impartial jury." (Respondent's Concise Statement of Matters Complained of on Appeal filed on January 2, 1997 at 1.). On September 9, 1997, the Superior Court of Pennsylvania remanded the case again to the trial court for another hearing in derogation of the factual and legal findings and conclusions of the trial court.

> It is true that in Pennsylvania, a verdict normally may not be impeached by post-trial testimony of jurors relating to alleged misconduct during deliberations. *Carter v. U.S. Steel Corp.*, 529 Pa. 409, 604 A.2d 1010 (1992). However, there is an exception. A juror may testify about the fact that extraneous influences were brought to bear during deliberations if those influences might have prejudiced the jury. *Id.* "Under this exception, the juror may testify only as to the existence of the outside influence but not as to the effect this outside influence may have had on deliberations." *Id.*, 529 Pa. At __, 604 A.2d at 1013.
>
> Herein, there are allegations that S.H.S. brought extraneous information to the deliberation process that he gained through his wife's experience with

> sexual abuse. This information was prejudicial to the defendant since it rebutted a key component of appellant's defense. Further, S.H.S. apparently was emotional and strongly predisposed toward conviction. This state of mind likely resulted from his own empathy with his wife's suffering and bias against anyone *accused* of similar conduct.
>
> (September 9, 1997 opinion of the Superior Court of Pennsylvania at 19-20).

The petitioner's application requesting reargument/ reconsideration of the September 9, 1997 judgment was denied by the Superior Court of Pennsylvania on November 20, 1997. On May 6, 1998, the Supreme Court of Pennsylvania denied the petitioner's Petition for Allowance of Appeal.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF PENNSYLVANIA ERRED BY AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA WHICH REVERSED THE TRIAL COURT'S DECISION THAT THE RESPONDENT WAS NOT DENIED TRIAL BY AN IMPARTIAL JURY UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND REMANDING FOR ANOTHER EVIDENTIARY HEARING.

II.

THE SUPREME COURT OF PENNSYLVANIA ERRED BY AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA WHICH CONFLICTS WITH *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD,* 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) AND SUBSEQUENT UNITED STATES COURTS OF APPEALS CASES.

The proper standard for a new trial for a juror's failure to disclose which was not applied by the appellate courts of Pennsylvania is set forth in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

> To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment

of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.

* * *

We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

It is a common-law rule of ancient vintage that a jury's verdict may not be impeached by the testimony of a juror concerning any influences on the jury's deliberations that emanated from within the jury room. *See Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 2745-46, 97 L. Ed. 2d 90 (1987); *McDonald v. Pless*, 238 U.S. 264, 268, 35 S. Ct. 783, 784, 59 L. Ed. 1300 (1915); *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 148 n.19 (3d Cir. 1975), *cert. denied*, 424 U.S. 9 17, 96 S. Ct. 1119, 47 L. Ed. 2d 323 (1976). That precept has been codified in the federal system as FED. R. EVID. 606(b).

U.S. v. Stansfield, 101 F.3d 909 (3rd Cir. 1996).

At the September 23, 1996 hearing, on direct examination, Mr. Snyder testified that he remembered, although not word for word, the trial court informing the jury panel that jurors were to be free, as humanly possible, of any bias, prejudice or sympathy and not to be influenced by preconceived ideas to the facts or law. He answered that he was aware that the case was about child molestation. He recalled that the jury questioning was a long process and he did not specifically remember some of the questions asked. He stated in regard to the question as to whether "you or members of your family or a close personal friend have had any experience relating to allegations of child molestation either as a victim, or a witness, or an accused" he did not remember hearing the complete question.

> As I stated to other individuals that have questioned me on the same issue, the same statement, I remember hearing parts of it. Whether I misinterpreted or didn't hear the whole thing, I do not know. And that is one reason why I did not answer in the affirmative when that question was asked or presented by the judge.
>
> (N.T. September 23, 1996 evidentiary hearing on remand at 27).

He stated "I didn't know if it basically particularly applied to me or not. Because, again, if I misinterpreted it or didn't hear the whole question, I couldn't say yes, it did. (N.T., September 23, 1996 evidentiary hearing on remand at 29).

> BY MR. WINTERS:
>
> Q. Did you feel uncomfortable when you heard this question?

A. I don't know if you can say uncomfortable. I don't know that — it didn't upset me. I mean, is it just uncomfortable? No, I can't say uncomfortable.

Q. Mr. Snyder, let me ask you. You knew it was a child molestation case. You knew about your family, your wife's personal experiences. Why didn't you raise your hand and tell Judge Moore?

A. When I didn't raise my hand, I was thinking, well, did I hear it or didn't I hear it? Did I hear it correctly? And if I did, what bearing would it have on this case?

Q. You didn't think the fact that there was allegations of your wife and sister-in-law were molested as children would have a bearing on the case for you to be an impartial juror?

A. The case involved Mr. Hunter. It didn't involve the individual that was —

Q. Mr. Hunter — excuse me.

Mr. Snyder, Are you telling me that — and you'll have to trust me on this. I counted. I believe it was five times you were advised or you were asked about it being a child molestation case and whether you had any reasons or any involvement, and you didn't think it applied. Is that your testimony, sir?

A. I can't see how an incident that happened to my family would have any bearing on this man's case.

Q. Well, I guess, Mr. Snyder, the problem I'm having, you weren't sure it applied, but you didn't tell the court, but yet you made a point of mentioning it to other jurors in deliberations?

THE WITNESS: I did not —

MR. CASTOR: I object.

THE COURT: Sustained.

BY MR. WINTERS:

Q. Mr. Snyder, when you heard the question or the parts of the question or whatever, in your own mind, did you think about raising your hand?

A. No.

Q. Your answer was no, sir?

A. No.

Q. Why didn't you want to raise your hand?

A. As I stated earlier, I could not understand how the incident that occurred in my family had any bearing on this case.

Q. So in other words —

A. I can't —

Q. I'm sorry.

A. What you're saying is I can't make an honest decision on the evidence that was presented to me in the trial.

Q. So I understand your answer — and you correct me if I'm wrong. You didn't raise your hand because you decided that you didn't think it would have any affect on the case? You didn't give the court or the attorneys the opportunity to make that decision, did you?

A. I did not.

Q. You did not. But you do admit you took an oath as a juror to answer all questions honestly, did you not?

A. Yes.

Q. So you didn't answer it because it was your feeling that it didn't apply or it wouldn't prohibit you from sitting on the jury; is that correct?

A. From sitting on the jury or making a decision on the case that was presented.

Q. Did you want to be on this jury, Mr. Snyder?

A. I don't think anybody wants to come to court and be specifically put on a jury. I was called by the Commonwealth of Pennsylvania, County of Montgomery, for possible jury duty. And I answered that call. The only thing I didn't answer was the affirmative question — the affirmative answer to the question that you keep posing to me.

> (N.T., September 23, 1996 evidentiary hearing on remand at 31-34).

Mr. Snyder stated when he heard parts of the question at issue he did not feel that he was violating his oath as a juror to answer the questions honestly by not responding. Even though he saw some other jurors raise their hands after other questions were asked, he did not at any time think that he should have raised his hand. Mr. Snyder testified in response to the Commonwealth's questions on cross-examination that he had never been molested, or a witness to molestation or accused of molestation.

> Q. And the fact is that when you heard that question, you thought that the question was being asked if you personally have been a victim, a witness, or accused, right?
>
> A. I think so.
>
> (N.T., September 23, 1996, evidentiary hearing at 57).

Prior to the September 23, 1996 hearing, defense counsel went to Mr. Snyder's home with a typed statement for Mr. Snyder to sign as to why he did not answer at *voir dire* the question at issue. Mr. Snyder asked that the part of the statement written by defense counsel which read "I did this because I did not think my wife would have wanted me to disclose this," be scratched out because it was not true. Mr. Snyder instead inserted "I did this because I did not think this applied to me because it did not involve me personally."

> Q. However, the defense did give you a preprinted form, didn't they?

A. Mr. Lentz wrote out a statement that I had agreed to sign.

Q. Right. Mr. Lentz typed it out for you to sign, true?

A. He wrote it out in longhand, I believe it was, at the time.

Q. And then it was reduced to typed, true?

A. Yes. And he informed me Id receive a copy of it, which I never did.

(Photocopy of Statement of Juror Samuel Snyder marked C- 1 for identification.)

BY MR. CASTOR:

Q. Okay. I'm going to show you what I've marked as Commonwealth's Exhibit C-1. Is this a copy of the statement that I'm taking about?

A. It's one I signed, yes, or a copy of it.

Q. Yes. And that's your signature on it, right?

A. Correct.

Q. And Mr. Kolins' signature, true?

A. Yes.

Q. And that statement has at the top the address and attorney ID number of Gavin Lentz, Esq., true?

A. Yes.

Q. And that's one of the lawyers representing Mr. Hunter, right?

A. I think so. Yes.

Q. Okay. And it is entitled "Statement of Juror Samuel Snyder." That's you, true?

A. True.

Q. Now, there is a serious [sic] of lines that are typed; is that right?

A. Yes.

Q. Who typed those?

A. I have no idea.

Q. Not you. Did they?

A. No. Not me.

Q. And the second sentence, the typewritten portion, the second part of the second sentence is scratched out, isn't it?

A. Yes.

Q. Who did that?

A. Mr. Lentz.

Q. Why did he do that?

A. I think he did it at the time —

MR. WINTERS: Excuse me. Would Your Honor like a copy?

THE COURT: Sure. I'd like to have a copy in front of me. Sure.

MR. CASTOR: I have an extra one. If I can approach the bench.

THE COURT: Fine.

MR. CASTOR: Let me rephrase that.

BY MR. CASTOR:

Q. The portion that was typed was scratched out because you didn't agree with it, true?

A. True.

Q. And the portion that is scratched out, the entire sentence reads — or the first part of it reads "During jury selection of this case, I declined to tell the judge that my wife had had similar things happen to her as that which happened to the victim." That's all still printed there, true?

A. True.

Q. And the second sentence says — this is the typewritten portion. "I did this because I did not

think my wife would have wanted me to disclose this." That's what it says underneath the scratched out portion, right?

A. Correct.

Q. But you asked that that be scratched out, true?

A. When he was rewriting it, yes.

Q. Yeah. Because that sentence is not true, correct?

A. That's correct.

Q. And in fact, you inserted words so that the sentence now read "I did this because I did not think this applied to me because it did not involve me personally." True?

A. True.

Q. Were you telling the truth when you added that portion in?

A. Yes.

Q. Is that a true and correct copy of the one that you signed?

A. Yes.

(N.T., September 23, 1996, evidentiary hearing on remand at 58-61).

At the September 23, 1996 hearing, Mr. Snyder testified that he told the truth as to all of the questions posed on *voir dire* and at no time lied.

> One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.

Dennis v. United States, 339 U.S. 162, 171 (1950) quoted in *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Mr. Snyder did not raise his hand after the question posed by the court at *voir dire* because, first, he did not remember hearing the entire question, and, second, he did not respond affirmatively because he thought that the alternatives described in the question, that is, "allegations of child molestation either as a victim or a witness or an accused" did not apply to him or involve him personally. The respondent did not follow up this question at *voir dire* in any more precise way. Mr. Snyder's failure to respond is not knowing, deliberate, intentional deceit. The respondent argues that all that has to be shown is that the juror answered a question incorrectly, or failed to answer a question posed at *voir dire* and, he is entitled to a new trial. The law is otherwise.

It was not shown that what the appellant characterizes as a correct response to the *voir dire* question would have required or resulted in a disqualification for cause. Certainly, based on the trial court's opinion, a different decision in the appellant's favor would not have occurred. *Doll v. Coffin*, 970 F.2d 964 (1st Cir. 1992). Mr. Snyder had no desire to be selected for this jury and his non response to the question at issue in no way

was intended to achieve being put on the jury. There was no proof of any kind of bias on Mr. Snyder's part.

Respondent could not demonstrate at the conclusion of the September 23, 1996 hearing that Mr. Snyder failed to answer honestly a material question on *voir dire*. Therefore, the first prong of *McDonough* was not met and a new trial appropriately denied. Even if Mr. Snyder had answered the question posed in the affirmative, a challenge for cause would not have been made out. At *voir dire*, the entire jury panel was asked if there was any reason each one could not be fair and impartial in this case regarding allegations of child sexual abuse. The panel was also asked if there was anything at all preventing each one of them from being fair and impartial in a case with these allegations and if anything related to sex would prevent each of them from being fair and impartial. Mr. Snyder did not answer in the affirmative to any of these questions and he testified he had answered all of the questions posed truthfully. It was Mr. Snyder's wife and her sister, not Mr. Snyder himself, who had been victims of sexual molestation, fifty or more years before this trial.

In addition, the argument that the respondent would have used a peremptory challenge to strike Mr. Snyder from the jury has no merit since actual prejudice was not established by the respondent. By using a peremptory strike against Mr. Snyder, the respondent would have given up a peremptory challenge against another juror who would have been unacceptable. *McDonough* specifically rejects this as a ground for a new trial. 464 U.S. at 555.

Based upon the testimony of Mr. Snyder given at the September 23, 1996 hearing before the trial court, the respondent did not prove actual bias or actual juror partiality.

More recent cases question the viability of "implied bias" *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988); *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), and, *Fitzgerald v. Greene*, 1998 WL 388405 (4th Cir. 1998) has declined to invoke it altogether in a case like the present one. Nevertheless, if it is still viable, the facts in the present case comport with the facts in *Smith v. Phillips*, 455 U.S. 209, 221, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) which is a pre-*McDonough* case where Justice O'Connor in a concurring opinion asserted that "implied bias" may also provide a basis for relief as follows:

> I believe that in most instances a post conviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.
>
> * * *
>
> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Smith v. Phillips, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. At 948, 949.

The petitioner asserts that the facts of this case do not fall into the above categories and implied bias does not exist. In *Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996) a juror, who had been raped twenty-five (25) years before the trial in that case, answered "No" to a *voir dire* question asking whether she had ever been involved in an incident similar to one giving rise to the defendant's trial for criminal sexual penetration. The lower court found, after hearing, that she answered honestly, she did not harbor actual bias against the defendant and she was not impliedly biased. If a victim of a rape like the juror in *Gonzales* can be found to be honest when answering "No" to a *voir dire* question as to whether she was ever involved in an incident similar to the incident of the defendant who was on trial, then Mr. Snyder in this case was correctly found to be honest and without bias, actual or implied, by the trial court. *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997); *Amirault v. Fair*, 968 F.2d 1404 (1st Cir. 1992); *United States v. Patrick*, 965 F.2d 1390 (6th Cir. 1992); *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991); *United States v. Howard*, 752 F.2d 220 (6th Cir. 1985).

The Supreme Court of Pennsylvania erred in affirming the reversal by the Superior Court of Pennsylvania of the trial court's findings and by remanding the case to the trial court for another hearing on the matter. The trial court's findings on issues of credibility and honesty are determinations peculiarly within the trial judge's province and are accorded great deference. *Amirault v. Fair*, 968 F.2d at 1405, citing *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Patton v. Yount*, 467 U.S. 1025 (1984).

For these reasons, the petitioner requests that the Supreme Court of the United States grant this Petition for Certiorari.

CONCLUSION

Wherefore, based upon the foregoing, the petitioner respectfully requests that the Supreme Court of the United States of America grant this Petition for Writ of Certiorari and reverse the Superior Court of Pennsylvania whose decision the Supreme Court of Pennsylvania refused to review.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DATED MAY 6, 1998

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 0956 M.D. ALLOCATUR DOCKET 1997.

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

ROBERT HUNTER

Respondent

Petition for Allowance of Appeal from
the Order of the Superior Court.

ORDER

PER CURIAM:

AND NOW, this 6th day of May, 1998, the Petition for Allowance of Appeal is hereby **DENIED.**

TRUE AND CORRECT COPY
ATTEST: May 7, 1998
s/ SHIRLEY BAILEY
SHIRLEY BAILEY
Chief Clerk

APPENDIX B — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DATED NOVEMBER 20, 1997

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 4129 Philadelphia 1996

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT HUNTER,

Appellant

ORDER

AND NOW, this 20th day of November, 1997, IT IS HEREBY ORDERED:

THAT the Commonwealth's application filed September 23, 1997, requesting reargument/ reconsideration of the decision dated September 9, 1997 is DENIED.

THAT appellee's application filed September 23, 1997, requesting reargument/reconsideration of the decision dated September 9, 1997 is DENIED.

s/ Per Curiam
PER CURIAM

APPENDIX C — JUDGMENT AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED SEPTEMBER 9, 1997

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 04129 Philadelphia, 1996

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT HUNTER,

Appellant

Appeal from the Order Entered November 14, 1996, in the Court of Common Pleas of Montgomery County, Criminal Division, at No. 1438-94.

BEFORE: BECK, TAMILIA & HESTER, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, *it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* MONTGOMERY *County be, and the same is hereby* MOTION TO STRIKE OR PRECLUDE PARTS OF THE APPELLANT'S REPRODUCED RECORD IS DENIED. REMANDED FOR PROCEEDINGS. JURISDICTION IS RELINQUISHED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: September 9, 1997.

Appendix C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 04129 Philadelphia, 1996

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT HUNTER,

Appellant

Appeal from the Order Entered November 14, 1996, in the Court of Common Pleas of Montgomery County, Criminal Division, at No. 1438-94.

BEFORE: BECK, TAMILIA & HESTER, JJ.

MEMORANDUM:

Robert Hunter appeals the November 14, 1996 order denying him a new trial. The order was entered following a hearing conducted pursuant to a remand order we entered in appellant's direct appeal. The issue in this appeal is whether a juror intentionally failed to disclose during *voir dire* that his wife and sister-in-law were victims of sexual abuse when asked if he or any member of his family had any experience relating to allegations of child molestation. We are constrained to disagree with the trial court's conclusion that the juror honestly but mistakenly failed to answer the question. The record leads inexorably to the conclusion that the juror knew the question applied to him but failed to respond because he thought the questions was irrelevant to the case. However, we are not able

to grant a new trial on the basis of the record before us. We remand for a hearing to determine if the juror brought information gained through his wife's experience to the attention of the other jurors and if that information was prejudicial to appellant.

The relevant facts follow. Appellant was convicted by a jury of two counts of indecent sexual intercourse and three counts each of indecent assault, corrupting the morals of a minor, and endangering the welfare of a child. On October 5, 1995, he was sentenced to a $50,000 fine and eight to sixteen years imprisonment. The factual history of the case follows:

> The defendant's convictions stemmed from specific incidents involving himself and T.K. On February 4, 1994, T.K. filed a complaint against the defendant alleging that he had sexually assaulted her on a number of occasions between 1988 and 1994. T.K. recalled three of these instances specifically: September 11, 1993, December 25, 1993, and January 14, 1994. At the time she made the complaint, T.K. was eleven years old. The defendant had been romantically involved with T.K.'s mother, J.K., for a number of years. An investigation into these charges was initiated by the Montgomery County Detective Bureau. This included an electronic interception of a conversation between the defendant and J.K. on February 6, 1994. (J.K. consented to the interception which took place inside of her home. Her sister, D.C. was also present on that day.). The defendant was arrested on February 9, 1994, and subsequently held over for trial.

Appendix C

At the trial, the Commonwealth presented a great deal of evidence in the form of witness testimony. This included testimony by L.B., a young friend of T.K.'s who recalled the evening when T.K. first related the defendant's misconduct. Dr. Allan DeJong, a pediatrician specializing in child sexual abuse, offered an expert opinion that T.K.'s physical condition was consistent with the type of sexual contact she had described. He went on to conclude, however, that her condition was non-specific, as it could have been caused by other factors as well. J.K. testified in detail about her relationship with the defendant, and was extensively cross-examined about her own personal life and motivations with respect to this case.[1]

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1. A brief background summary may be useful as the facts surrounding this case are somewhat complex. At the time the allegations of sexual abuse were made against him, the defendant was the subject of a Securities and Exchange Commission (SEC) investigation. The SEC probe concerned the defendant's possible use of insider information with regard to a bank stock transaction. John Heffernan was one of the SEC agents investigating the defendant. Mr. Heffernan questioned J.K. as part of the investigation. He later became romantically involved with J.K. and they were eventually married. Mr. Heffernan was removed from the case involving the defendant when his relationship with J.K. was disclosed.

Further, J.K. filed a civil lawsuit against the defendant on behalf of herself and T.K. in Delaware County. The suit covered the same

allegations first raised in the criminal complaint and set damages in excess of three million dollars. At the criminal trial, the defendant argued that the charges against him were part of a scheme concocted by J.K. and John Heffernan. The defendant contended that they coerced T.K. into making these allegations in order to extort a large sum of money from him.

The probative evidence, however, came through the testimony of T.K.; along with the audiotape of the aforementioned intercepted conversation between J.K. and defendant.

T.K. testified during her direct examination that the defendant had been sexually molesting her from the time she was in first or second grade. The first episode occurred in a swimming pool in Florida. From that occasion until the time of her disclosure, T.K. testified that the defendant had touched and licked her breasts and vagina, had made her touch his penis and put his penis in her mouth. T.K. could not be specific as to the number of times the defendant sexually assaulted her. She did testify that the molestations took place at the defendant's homes in Huntington Valley, Pennsylvania, Stuart, Florida, and Stone Harbor, New Jersey. The three episodes about which T.K. testified in detail, and for which the defendant was charged, occurred at the home in Huntington Valley. T.K. testified that on September 11, 1993, the defendant came into the master bedroom where she was watching television. He told her to take off her clothes, whereupon he touched her vagina. As far as she knew, she and the defendant

were alone in the house because her mother had left earlier to attend a wedding. The second episode occurred on Christmas Day, 1993. T.K. testified that on that evening she went into the room where defendant kept his desk in order to retrieve a Christmas card for her mother, who had already gone to bed. The defendant came in behind her and shut the door. He told her that if she did not put his penis in her mouth, he would not wish her mother a Merry Christmas or give her a card. T.K. testified that she complied, and after this assault the defendant gave her money to put in the card for her mother. The final episode of molestation occurred on January 14, 1994. T.K. testified that she and her friend J.J. were spending the night at the defendant's home. The next day, they were all to fly to Florida for a vacation. T.K. asked the defendant if they could go to Bertucci's, her favorite restaurant, for dinner that evening. The defendant told her to follow him into his room. Once they were in his room, the defendant took T.K. into his bathroom and told her that if she did not put his penis into her mouth, he would not take her and her friend to the restaurant. T.K. testified that she once again complied with the defendant's demand.

When asked why she waited so long before coming forward, T.K. stated that she was afraid that her mother would not believe her and be angry. She was also concerned that her mother would have to return to her job as a waitress. Additionally, T. K. testified that, despite the consequences, she decided that she did not want the abuse by the defendant to

> continue. She finally told her friends M. and L. during a slumber party. The two girls corroborated this account through their own testimony.
>
> The audiotape of the intercepted conversation offered as evidence at the trial also served to prove the allegations made by [T.K.] The tape was recorded on February 6, 1994 by Detective Joseph Ryan of the Delaware County Detective Bureau and Katherine Hart of the Montgomery County Detective Bureau. The audiotape contained a recording of a conversation the defendant had with [J.K.] and her sister, (D.C.]. The defendant made certain admissions that, while not addressing the specific instances described by [T.K.], did infer a strong likelihood of sexual misconduct with the girl.

Superior Court Memorandum, 4/29/96, at 1-4. In the taped conversation, the sexual misconduct admitted by appellant consisted of allowing T.K. to "hump" his leg while they were lying on the couch watching television and allowing her to touch the outside of his pants, over his penis.

Appellant also presented evidence from witnesses who were present on the premises on the three specific dates which T.K. identified as dates of abuse. Those witnesses indicated that appellant did not have an opportunity to molest T.K. and that she did not appear upset or abnormal on those dates. Further, T.K. had made allegations that appellant penetrated her with his penis. However, charges based on these allegations were dropped since T.K.'s hymen was fully intact, and there were no scars or lesions in the vaginal area.

Appendix C

Following his conviction, appellant filed a direct appeal. Therein, he raised nine allegations of error. The allegation pertinent to this appeal involves a juror, S.H.S.,[1] and his answer to a *voir dire* question. The jurors were asked, "Have any of you *or members of your family* or close personal friends have had *any experience* relating to allegations of child molestation, either as a victim or a witness or an accused? Reproduced record ("R.R.") at 2217a (emphases added). Five jurors, but not S.H.S., answered affirmatively. All five were removed from the jury. S.H.S. was seated as an alternate and sat on the jury when one of the regular jurors was excused.

After the trial, appellant discovered that S.H.S.'s wife and sister-in-law both had been molested by their father when they were the same age as the victim herein. Through interviews with other jurors, appellant discovered that S.H.S. allegedly injected his wife's personal experience with molestation into the jury deliberations to the detriment of appellant.

In the direct appeal, we remanded for an evidentiary hearing to determine whether S.H.S. deliberately had failed to answer the question honestly, knowing it pertained to him. An evidentiary hearing was conducted on September 23, 1996, limited to that one issue.

At the hearing, a statement S.H.S. gave to appellant's investigator was introduced into evidence. It reads:

> During jury selection in this case, *I declined to tell the Judge that my wife had had similar things happen to her* as that which happened to the victim.

---

1. To protect the privacy of S.H.S.'s wife and sister-in-law, we have used initials to identify him.

> I did this because I did not think this applied to me because it didn't involve me personally. . . . *When I found out this was a molestation case, I thought of my wife's molestation but did not voluntarily [sic] disclose this because [I] was uncomfortable.* Looking back, I probably should have disclosed it.

Statement of Juror S.S., 8/25/96, at 1 (emphasis added).

At the hearing, S.H.S. initially explained his failure to answer the question as follows:

> As I stated to other individuals that have questioned me on the same issue, the same statement, I remember hearing parts of it. Whether I misinterpreted or didn't hear the whole thing, *I don't know.* And that is one reason why I did not answer in the affirmative when that question was asked or presented by the judge.

Notes of Testimony, 9/23/96, at 27 (emphasis added). However, when asked if he had known the question applied to him, S.H.S. responded it "possibly did. Yes." *Id.* at 30. Furthermore, when asked which part of the question he did not interpret correctly or which part he did not hear, S. H. S. was not able to supply an answer.

The following exchange then occurred:

> Q. Mr. [S.], let me ask you. You knew it was a child molestation case. You knew about your family, your wife's personal experiences. Why didn't you raise your hand and tell Judge Moore?

> A. When I didn't raise my hand, I was thinking well, did I hear it or didn't I hear it? Did I hear it correctly? *And if I did, what bearing would it have on this case?*

Id. at 31-32 (emphasis added). Juror S. elaborated, "I can't see how an incident that happened to my family would have any bearing on this man's case." *Id.* at 32. When asked again why he did not answer the question, he insisted, "*I could not understand how the incident that occurred in my family had any bearing on this case.*" *Id.* at 33 (emphasis added). S.H.S. also stated that he did not answer the question because he felt "uncomfortable," *id.* at 36, while admitting that he did immediately think of his wife when the question was posed.

The district attorney then questioned the witness. First, the district attorney attempted to create a misunderstanding on the part of the juror as to applicability of the question, asking "And the fact is that when you heard that question, you thought that the question was being asked if you personally have been a victim, a witness, or accused, right?" *Id.* at 57. S.H.S. was not able to respond unequivocally even to this question. He merely stated, "I think so." *Id.*

Appellant then established at the hearing that had S.H.S. revealed his wife's experience, he would have been stricken for cause. Appellant's trial counsel testified that "every juror who had any connection, however tangential, to molestation was stricken." *Id.* at 93. He recalled:

> We discussed the question about victim, witness, and family with [the trial judge] and with [the prosecutor], helped frame it. And every juror who raised their hand — and frankly, it was sad that there

> were so many that did raise their hands, had experience with molestation, *they were stricken and the Commonwealth didn't object.*

Id. at 93 (emphasis added). The judge conducting the hearing wanted to establish whether the challenges were made for cause or were peremptory. The following exchange occurred:

> THE COURT: They were stricken mostly peremptory, not for cause.
>
> [APPELLANT'S TRIAL COUNSEL]: They were not stricken peremptory. We made a motion. The Commonwealth agreed.
>
> THE COURT: All of them?
>
> [APPELLANT'S TRIAL COUNSEL]: My recollection is everybody that came in the back room and said they had had a family experience with molestation was removed from the jury. I'm certain of that.
>
> THE COURT: For cause?
>
> [APPELLANT'S TRIAL COUNSEL]: I believe that there was no opposition from the Commonwealth, Your Honor.

Id. at 94. The district attorney present at the hearing then confirmed that all jurors who answered the question affirmatively were successfully challenged for cause, stating, "[F]rom my reading of the record, I believe that's correct. . . . I think everyone

who responded in some fashion to this question [was] excused." Id. at 94.[2] Appellant's trial counsel also indicated that he would have exercised a peremptory challenge to the juror in the event that a challenge for cause would not have been granted.

Russell Kolins, appellant's private investigator, testified as follows. On July 16, 1995, he interviewed S.H.S. to verify reports from other jurors that S.H.S. had indicated to them that it was common for victims of abuse to not report it for long periods of time. During the interview, S.H.S. verified that his wife and sister-in-law had been molested by their father and that he knew it during jury selection. S.H.S. told Mr. Kolins that he did not reveal this information since "[h]e didn't feel that it would be pertinent to the case. . . . He felt that it wasn't an issue that he had to be concerned with. He felt that [appellant] was guilty at the time of — during jury selection." *Id.* at 130.

In accordance with our remand order, the hearing was limited to a determination of whether S.H.S. knowingly failed to respond to the *voir dire* question. The remand hearing was limited in that manner because during direct appeal, we had concluded that if S.H.S. knowingly failed to disclose his wife's sexual abuse, a new trial automatically should be ordered. We based this conclusion on one case, *Commonwealth v. Rosario,* 198 Pa.Super. 177, 182 A.2d 75 (1962). In *Rosario,* two jurors had failed to reveal that they were parents of Pennsylvania state troopers despite being asked during voir dire if they were related to any law enforcement officers. We granted a new trial. We

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2. We have reviewed the *voir dire* transcript, and it is unclear from that transcript what transpired. There was an in-chambers discussion after the question was asked. None of the veniremen who responded to the question sat on the jury. In light of the district attorney's admission, we accept for purposes of appeal that the trial judge would have excused S.H.S. for cause.

held that if a juror knowingly fails to give an answer to a question applicable to him during *voir dire,* the defendant does not have to establish that he was harmed or that the juror was prejudiced against him. We concluded that such a false answer prevents a defendant from intelligently exercising a peremptory challenge and requires a new trial.

Therefore, on remand, the trial court was to determine if S.H.S. knowingly failed to answer the question, and if he did, the court was to grant a new trial. Herein, the trial court found that S.H.S. had not knowingly failed to respond to the question. The court indicates that it made a credibility determination that S.H.S. answered truthfully when he stated that he misunderstood the question and thought he answered truthfully. The court implies that we, as an appellate court, are powerless to disturb this credibility determination.

However, we can overturn this "credibility determination" because S.H.S. never testified that he honestly and to the best of his knowledge did not answer the question because he did not think it applied to him. We will accept S.H.S.'s testimony at the hearing as entirely truthful. Nonetheless, that testimony establishes beyond a cavil that he knew that the question applied to him and elected not to answer it since he did not feel that his wife's experience impacted on his ability to perform as a juror. Initially, we examine S.H.S.'s statement which reads in pertinent part: "During jury selection in this case, I declined to tell the Judge that my wife had had similar things happen to her as that which happened to the victim." Thus, S.H.S. admits that he *decided* not to tell the judge about his wife. In the statement, he continues that he did not answer since he did not feel "comfortable" and since the molestation did not "involve him personally." He *never states* that he misunderstood the question.

Appendix C

At the hearing, S.H.S. initially indicated that he "may have" misinterpreted or not heard parts of the question. However, when questioned about *what he did not understand or hear*, S.H.S. could *not* respond. At the hearing, the district attorney even attempted to *create* for S.H.S. a way that he *could* of misunderstood the question. The district attorney asked S.H.S. whether he thought the question only applied if S.H.S. himself were a victim of abuse. However, S.H.S. could not offer an unqualified affirmative to this question. He responded that he "thought" so. Furthermore, it is impossible to misunderstand the question in that manner. The question applied to jurors *or* members of their family *or* friends.

Rather, the truth was revealed at the hearing. When questioned directly as to why he did not answer the question, S.H.S. offers only one concrete reason, and he repeated that reason *three times*. He stated that he did not think his wife's abuse had "any bearing" on appellant's case. N.T., 9/23/96, at 31, 32, 33. He candidly states that he did not answer the question because he, unilaterally, decided that it was not pertinent to this case. This reason was the same as the one originally given to appellant's investigator.

The record establishes conclusively that S.H.S. knew the question applied to him, but he did not answer since *he* decided that it was not relevant to appellant's case that his wife was molested as a child. However, that determination was not his to make; that determination was for the court. Scienter is established in this case. *See Burton v. Johnson*, 948 F.2d 1150 (9th Cir. 1991) (where post-trial affidavit indicated that juror was aware question applied to her but was too afraid to answer, knowing failure to disclose is present). *Compare Commonwealth v. Didyoung*, 369 Pa.Super. 346, 535 A.2d 192 (1988) (where

voir dire questions were ambiguous and did not apply clearly to juror's situation and where there was no evidence of juror's bias against defendant, a new trial was not warranted by juror's failure to answer two questions on *voir dire).*

Now we reach the more problematic issue of whether *Commonwealth v. Rosario, supra,* requires that we automatically grant a new trial. In the direct appeal, our remand order was based solely on *Rosario.* However, there is a considerable body of case law on this issue, and that case law merits examination for proper resolution of this case.

Indeed, the scope of *Rosario's* holding was circumscribed considerably in *Commonwealth v. O'Kicki,* 408 Pa.Super. 518, 597 A.2d 152 (1991). In *O'Kicki,* the defendant was a judge on the Court of Common Pleas of Cambria County. The veniremen were asked whether they or any member of their family had appeared before the defendant. One juror who sat did not answer the question even though his son had appeared in a juvenile proceeding before the defendant seventeen years earlier. Defendant asked that we apply *Rosario.* In declining to grant a new trial, we concluded that defendant had not been prejudiced by the juror's presence on the jury. The juror's son had received favorable treatment before the defendant, and there was no indication that the juror had been biased or prejudiced against the defendant. Thus, *O'Kicki* unquestionably indicates that a new trial is not automatic even in the face of knowing non-disclosure.

Similar law is applied by the federal courts. In *McDonough Power Equipment. Inc. v. Greenwood,* 464 U.S. 548 (1984), the Supreme Court decided whether a venireman's failure to answer a question required grant of a new trial in the civil setting.

Appendix C

A juror had failed to reveal that his son had broken his leg in an accident even though he was asked whether any member of his family had ever sustained severe injury that resulted in disability or prolonged pain and suffering. The circuit court granted a new trial based on the fact that an average jury would have answered the question. The Supreme Court reversed, holding that to obtain a new trial, "a party must first demonstrate that a juror failed to answer honestly a material question *on* voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. The Court concluded that only reasons for concealing information which affect a juror's impartiality can be grounds for a new trial and remanded for a hearing to determine if those circumstances exited in the case before it.

The *McDonough* decision has been applied consistently in the criminal setting. However, the concepts of prejudice to the party and the existence of a challenge for cause have been intertwined, which is not surprising since a challenge for cause will be granted only against prejudiced jurors. Thus, the focus is on the existence of juror impartiality. *See United States v. Langford,* 990 F.2d 65, 70 (2d Cir. 1993) (juror failed to reveal criminal past due to embarrassment and even though there may have been a valid challenge for cause, the court refused to grant a new trial since there was "absolutely no evidence" that the juror was "in anyway biased or prejudiced" against the defendant); *United States v. North,* 910 F.2d 843 (D.C. Cir. 1990) (even though juror failed to reveal that his brother had been arrested, there was no need for a new trial since there was no evidence of juror bias); *Baca v. Sullivan,* 821 F.2d 1480 (10th Cir. 1987) (juror failed to reveal that his brother was a police officer, but there was no evidence of bias and the brother was retired so that juror did not think question applied to him).

But see Burton v. Johnson, supra (new trial granted where juror knowingly failed to disclose she was a victim of spousal abuse in case involving abuse since juror could have been stricken for cause as all other abused jurors were).

Helpful in an analysis of the present case is a comparison between *Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996), and *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984). In *Perkins*, a juror failed to respond to two voir dire questions which pertained to, him: he was acquainted with the defendant and he had been involved in a trial as a witness similar to the criminal trial at issue. The court concluded that the juror knowingly gave false answers to the questions since it was not credible, as the juror protested, that he had forgotten knowing the defendant and being involved in a similar case. The court concluded that the false answers created a presumption of bias. Key in the court's decision to grant a new trial, however, was the fact that the juror had used his knowledge of the defendant during deliberations and was outspoken in his belief that the defendant should be convicted.

In contrast, the court in *Gonzales v. Thomas, supra,* did not grant defendant a new trial in a rape case where a juror had been a victim of date rape twenty-five years earlier. The juror had been asked about involvement in an "incident similar to the one giving rise" to the defendant's case. *Gonzales v. Thomas, supra,* 99 F.3d at 984. The court gave credence to the juror's professed belief that the two cases were not similar. The defendant's case involved use of physical violence, threats against the victim's child and niece, guns, and anal intercourse. In the juror's case, she was intoxicated, there was no violence, there was no police report filed, she was not traumatized, and the event did not influence future relationships.

More importantly, the *Gonzales* court determined that the juror had not used her experience to influence jury deliberations adversely to defendant. Significantly, the juror's experience did surface during deliberations. Another juror indicated that he thought that a woman never had to be penetrated during a rape unless she wanted to be penetrated. The juror, citing her experience, said that a woman could be penetrated against her will. The circuit court in *Gonzales* noted that the juror had not used her experience to create bias but to dispel bias and an incorrect assumption that a woman could not be forced to have sex against her will. *See also Amirault v. Fair,* 968 F.2d 1404 (1st Cir. 1992) (juror had completely blocked memory of forty-year-old rape and incident had no affect on her ability to be impartial).

In the case before us, knowing failure to respond, as discussed above, is present. Further, based on the record, we cannot reach any other conclusion but that appellant would have been able to challenge S.H.S. for cause at trial. Beyond those two facts, however, lies the most important consideration, whether S.H.S. was biased or prejudiced. That determination, unfortunately, cannot be reached with the present state of the record.

There is a *strong* indication here that S.H.S.'s presence on the jury and familiarity with his wife's abuse caused prejudice to appellant. At trial, appellant contended that the charges at issue were the result of recent fabrication and were an attempt to extort money from him in a pending civil action. A key component of that defense was T.K.'s failure to come forward with the allegations for six years.

An affidavit submitted by appellant's investigator, Mr. Kolins, indicates that he interviewed jurors in this case, and

they informed the investigator that during deliberations, S.H.S. had stated that he had "'personal knowledge' that women and children who had been sexually molested do not normally divulge such conduct until many years later." R.R. at 1962a. Mr. Kolins interviewed S.H.S. on July 16, 1995, and S.H.S. discussed his knowledge of delayed disclosure by sexual abuse victims. He stated that he understood T.K.'s silence since he had "seen it happen to his close family members." R.R. at 1964a. S.H.S. also confirmed that he became emotionally upset during deliberations when he discussed the issue.

At the remand hearing, jurors were available and willing to testify about S.H.S.'s statements and demeanor during deliberations. N.T., 9/23/96, at 105, 148. Due to the narrow scope of our remand order, however, the court refused to take *any* testimony about the deliberations. *Id.* at 11-17 (court refused to hear any testimony about jury deliberations, including use of extraneous information by S.H.S., and granted the defense an exception to this ruling) It is clear that this prohibition prevented appellant from establishing bias or prejudice.

It is true that in Pennsylvania, a verdict normally may not be impeached by post-trial testimony of jurors relating to alleged misconduct during deliberations. *Carter v. U.S. Steel Corp.*, 529 Pa. 409, 604 A.2d. 1010 (1992). However, there is an exception. A juror may testify about the fact that extraneous influences were brought to bear during deliberations if those influences might have prejudiced the jury. *Id.* "Under this exception, the juror may testify only as to the existence of the outside influence, but not as to the effect this outside influence may have had on deliberations." *Id.*, 529 Pa. at __, 604 A.2d at 1013. *See also Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987) (jurors were competent to testify that one of

jurors stated that defendant was wanted for two other murders but were not competent to testify about the effect the information had on deliberations); *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991) (while the defendant may not delve into the process of jury deliberations, he can adduce testimony about whether extraneous prejudicial information was brought before the jury and a defendant is entitled to a new trial unless that information could not have influenced the verdict). The rule and its exception are intended to reach a balance between ensuring fair trials, free from improper influence, and ensuring finality of verdicts and protection of the sanctity of jury deliberations. *Carter v. U.S. Steel Corp., supra;*

Herein, there are allegations that S.H.S. brought extraneous information to the deliberation process that he gained through his wife's experience with sexual abuse. This information was prejudicial to the defendant since it rebutted a key component of appellant's defense. Further, S.H.S. apparently was emotional and strongly predisposed toward conviction. This state of mind likely resulted from his own empathy with his wife's suffering and bias against anyone *accused* of similar conduct. Thus, S.H.S. appears much like the juror in *United States v. Perkins, supra,* and little like the juror in *Gonzales v. Thomas, supra.* He knowingly failed to respond to the question because he did not think it was relevant to appellant's case. Meanwhile, he directly brought his wife's experiences to bear in the case.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial* jury." U.S. CONST. amend. VI (emphasis added).[3] This provision

3. A defendant also has a constitutional right to an impartial jury under section 9 of article 1 of the Pennsylvania Constitution. *Commonwealth v. Kerpan*, 508 Pa. 418, 498 A.2d 829 (1985).

"guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors.' " *Irvin v. Dowd,* 366 U.S. 717, 721 (1961). A jury must be "capable and willing to decide the case *solely on the evidence before it." Smith v. Phillips,* 455 U.S. 209, 217 (1982) (emphasis added); *accord Commonwealth v. Williams, supra* (under our system, a case must be decided based only upon the evidence and arguments in open court and not by outside influence); *Commonwealth v. Santiago,* 456 Pa. 265, 318 A.2d 737 (1974).

Thus, we must remand for a determination of whether S.H.S. used his knowledge of delayed reporting of sexual abuse to dispel appellant's defense or whether his knowledge of his wife's experience caused him to be biased or prejudiced against appellant. The testimony of the other jurors is necessary to make this determination. The jurors are competent to testify about S.H.S.'s use of extraneous influence on the jury, his use of evidence that was not before the jury, and his bias against appellant. The jurors are not competence to testify about the effect these influences or that bias had on deliberations. *Commonwealth v. Williams, supra.*

Commonwealth motion to strike or preclude parts of the appellant's reproduced record is denied. The case is remanded for proceedings consistent with this adjudication. Jurisdiction is relinquished.

Beck, J. Concurs in the Result.

APPENDIX D — OPINION OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED FEBRUARY 3, 1997

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CRIMINAL DIVISION

NO. 1438-94
4129PHL96

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT W. HUNTER

OPINION

Moore, J. **February 3, 1997**

On June 9, 1995, following a jury trial, the Defendant, Robert W. Hunter, was found guilty on numerous charges of sexual abuse of a young girl. Subsequently, the Defendant was sentenced to eight to sixteen years of incarceration. Hunter then appealed his convictions to the Superior Court. The Superior Court affirmed the convictions but directed the trial court to hold an evidentiary hearing on the sole issue of alleged juror misconduct. On November 14, 1996, following the evidentiary hearing, this Court issued an Order denying the Defendant's Motion for a New Trial. Hunter now appeals claiming that he was deprived of his right to a trial by a fair and impartial jury.

Appendix D

FACTS AND PROCEDURAL HISTORY

The case against the Defendant arose from allegations that he sexually abused a young girl over a period of about six years. On February 4, 1994, Miss Tara Kelly filed a complaint against Hunter alleging that he had sexually assaulted her on many occasions between 1988 and 1994. At the time of the complaint, Tara Kelly was only eleven years old.

During the nearly two-week trial, the Commonwealth presented ample witness testimony. Tara Kelly testified that Hunter had begun sexually molesting her when she was in first or second grade. (N.T. 6/6/95 at 765). She further testified that, during the period of abuse, Hunter had touched and licked her breasts and vagina, had made her touch his penis, and had put his penis in her mouth. *Id.* at 766. Also, Tara testified that the molestations took place at Hunter's homes located in three different states. *Id.* at 768. Although Tara could not provide a precise number of times that the Defendant had molested her, *Id.* at 780, she did give detailed descriptions of three assaults which occurred at Hunter's home in Huntington Valley, Pennsylvania. It was these three assaults that formed the basis for Hunter's convictions.

Tara testified that the first of these three assaults occurred when Hunter came into the bedroom where she was watching television, told her to remove her clothes, and then proceeded to touch her vagina. *Id.* at 770. The second of these assaults occurred on Christmas Day, 1993. *Id.* at 771-773. Tara testified that she went into the room where Hunter kept his desk in order to retrieve a Christmas card for her mother, who had already gone to bed for the evening. *Id.* at 773. The Defendant then entered the room, closed the door, and told Tara that he would not wish her mother a Merry Christmas or give her a card, unless she put

his penis in her mouth. *Id.* Tara testified that, after she complied, Hunter gave her some money to put inside the card for her mother. *Id.* at 774. The last of these three assaults occurred when Tara asked Hunter if he would take her and a friend out to dinner. *Id.* at 775. Hunter responded by taking Tara into his bathroom where he told her that, if she did not put his penis in her mouth, then he would not take them out to dinner. *Id.* Tara testified that she complied with Hunter's demand. *Id.* at 773.

In addition to the convincing testimony given at trial by Tara Kelly and the other prosecution witnesses, the Commonwealth introduced an audiotape recording of the conversation involving Hunter. This recording strongly buttressed Tara's trial testimony. During the conversation, Hunter is heard making certain admissions that, while not addressing the specific instances described by Tara, did infer a strong likelihood of sexual misconduct with the girt. (See Commonwealth Exhibit 17, Transcription of Audiotape Recording).

Upon the conclusion of his jury trial, Hunter was found guilty on two counts of Involuntary Deviate Sexual Intercourse, three counts of Indecent Assault, three counts of Corruption of a Minor, and three counts of Endangering the Welfare of Children. Shortly thereafter, the Defendant was sentenced to eight to sixteen years of incarceration. Hunter then filed an appeal of his convictions to the Superior Court based upon a litany of alleged errors committed by the trial court.

On appeal, the Superior Court found no reversible error by the trial court. In addition, the Superior Court found the Defendant's claim regarding bail to be meritless and affirmed the trial court's denial of bail pending appeal. The Superior Court then denied Hunter's petition for reargument and affirmed

Hunter's convictions in their entirety. Hunter declined to appeal these decisions to the Pennsylvania Supreme Court. However, after affirming Hunter's convictions, the Superior Court did direct the trial court to hold an evidentiary hearing to determine whether the juror in question knowingly failed to respond to an inquiry during *voir dire.*

On September 23, 1996, pursuant to the Superior Court's directive, this Court held a full evidentiary hearing on the issue. At the hearing, the juror in question, Samuel H. Snyder, testified at length, as did the lead defense attorney from Hunter's trial, Gavin P. Lentz, and a private investigator, Russell Kolins, who was in the employ of Lentz. The testimony focused on the meetings between the defense team and Juror Snyder and on the question which this Court posed to the entire venire panel regarding child molestation to which Juror Snyder did not raise his hand.[1] From the testimony elicited at the hearing, a fuller picture emerged as to the facts surrounding the juror's alleged nondisclosure on *voir dire.*

In the days following the trial, the defense team mounted an investigation of the entire jury panel.[2] Kolins managed to contact ten of the twelve jurors but failed to contact the remaining two

1. The question at issue is: "Have any of you or members of your family or close personal friends have had any experience relating to allegations of child molestation, either as a victim or a witness or an accused?" (N.T. 5/30/95 at 127).

2. In the course of our research, we have learned that some jurisdictions have rules that require parties to get permission from the trial court before they may contact jurors after a trial and that allow the trial court to dictate the length and manner of such contact. *See McDonough Power Equipment Inc., v. Greenwood,* 464 U.S. 548, 550-551, 104 S.Ct. 845, 847 (1984). We would strongly urge that such a rule be adopted in Pennsylvania.

because one never responded to Kolins' requests and the other hired an attorney who prevented Kolins from speaking with his client. (N.T. 9/23/96 at 137). In the course of their investigation, the defense learned that Juror Snyder's wife and her sister had had some personal experience long ago with child molestation. Because the jurors had been asked the one question on *voir dire* regarding experiences with child molestation, the defense team vigorously pursued this issue. In fact, Kolins showed up unannounced at Juror Snyder's front door on three separate weekend evenings. *Id.* at 135.

At the evidentiary hearing, Juror Snyder was questioned extensively by both sides about the *voir dire* question and about why he had not raised his hand when the question was posed to the jury panel. In response, Juror Snyder testified that he did not remember the exact phrasing of the question, *Id.* at 25 & 26, and that he may have misinterpreted the question. *Id.* at 27. Juror Snyder further testified that, as he understood the question, he did not believe that it applied to him. *Id.* at 29 & 70.

On November 14, 1996, based upon the testimony adduced at the evidentiary hearing, this Court issued an Order denying the Defendant's Motion for a New Trial. The Defendant now appeals, for a second time, to the Superior Court claiming that he was deprived of his right to a trial by a fair and impartial jury due to Juror Snyder's nondisclosure on *voir dire*. The Defendant claims that, had Juror Snyder disclosed his wife's experiences regarding molestation, he would have been stricken from the jury, either by the trial court for cause or by defense counsel through a peremptory strike. As a result, Hunter claims that he is entitled to a new trial. We disagree.

Appendix D

DISCUSSION

I. The Right to a Fair Trial:

The United States Supreme Court has long held that '[a litigant] is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-232, 93 S.Ct. 1565, 1570 (1973) (quoting *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968), and *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490 (1953)). As the Supreme Court explained,

> Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload.

McDonough Power Equipment Inc. v. Greenwood, 464 U.S. 548, 553, 104 S.Ct. 845, 848 (1984). The Supreme Court further noted that we have "come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered 'citadels of technicality.' " *Id.*, (citations omitted). Accordingly, harmless error rules have been adopted to "embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.*

In the words of the Supreme Court, "[o]ne touchstone of a fair trial is an impartial trier of fact — 'a jury capable and willing to decide the case solely on the evidence before it.' " *Id.* at 554,

104 S.Ct. at 849 (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946 (1982)). However, the law recognizes that it would be unrealistic to expect jurors to be free from all prejudices, and it expects merely a mind sufficiently conscious of its sworn responsibility and willing to attempt to reach decisions solely on the facts presented, assiduously avoiding influences of irrelevant factors. *Schwarzbach v. Dunn*, 252 Pa. Super. 454, 459, 381 A.2d 1295, 1297 (1977). In cases where there are allegations of juror partiality, the proper remedy is a hearing in which the defendant has an opportunity to prove actual bias. *Smith*, 455 U.S. at 215, 102 S.Ct. at 946.

II. Juror Nondisclosure on Voir Dire:

The leading case on the principles governing a party's right to a new trial on the ground of juror nondisclosure during *voir dire* is *McDonough Power Equipment. Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845 (1984).[3] In *McDonough,* the United States Supreme Court held that a party is not entitled to a new trial unless the juror's failure to disclose denied the party their right to an impartial jury. 464 U.S. at 549, 104 S.Ct. at 846-847. The Supreme Court stated that *voir dire* serves to protect an individual's right to a fair trial "by exposing possible biases, both known and unknown, on the part of potential jurors." *Id.* at 554, 104 S.Ct. at 849. After noting that "demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges," *Id.* at 554, 104 S.Ct. at 849, the Supreme Court outlined a two-prong test for determining whether a party is

3. Although *McDonough* was a civil case, the test is applicable to criminal cases as well. *See, e.g., United States v. North,* 910 F.2d 843, 904 (D.C. Cir. 1990); *United States v. Aguon,* 851 F.2d 1158, 1170 (9th Cir. 1988).

entitled to a new trial based on juror nondisclosure during *voir dire*. *Id.* at 556, 104 S.Ct. at 850. The Supreme Court held that, in order to obtain a new trial, a party must first demonstrate that the juror in question failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. *Id.*

Under the *McDonough* test, if a juror is found to have answered "the *voir dire* query honestly yet inaccurately" and the juror credibly states that he was not biased or partial, then the defendant is not entitled to a new trial. *United States v. Ortiz*, 942 F.2d 903, 909 (5th Cir. 1991). Similarly, if a juror inadvertently fails to disclose and there is no bias shown, then the defendant's request for a new trial should rightly be denied. *United States v. Brown*, No. 95-10969, 1996 U.S. App. LEXIS 33473, at *23-24 (5th Cir. Dec. 23, 1996). Also, if the trial court finds that a juror answered *voir dire* questions honestly and to the best of his knowledge, then bias may not be inferred from his failure to disclose during *voir dire*, and a new trial is not warranted. *Rhoden v. Morgan*, 863 F. Supp. 612, 616 (M.D. Tenn. 1994). The party seeking a new trial due to nondisclosure must show actual bias. *Baca v. Sullivan*, 821 F.2d 1480, 1483 (10th Cir. 1987); *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984).

In addition to inadvertent nondisclosures, the *McDonough* test also governs deliberate nondisclosures. *United States v. Langford*, 990 F.2d 65, 68 (2nd Cir. 1993). In such cases, the defendant must also prove actual bias on the part of the juror in order to be entitled to a new trial because juror dishonesty, alone, is not proof of bias. *Id.* at 69-70; *United States v. North*, 910 F.2d 843, 904-905 (D.C. Cir. 1990). Also, under *McDonough*, a valid basis for a challenge for cause, absent a showing of actual bias, is insufficient grounds for a new trial. *North*, 910 F.2d at

904. As the Supreme Court noted, "the motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 556, 104 S.Ct. at 850.

In his concurring opinion in *McDonough*, Justice Brennan similarly stated that bias should be required even if the juror's nondisclosure was deliberate:

> [The] proper focus when ruling on a motion for new trial in this situation should be on the bias of the juror and the resulting prejudice to the litigant . . . Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in the . . . determination of actual bias.

Id. at 557-558, 104 S.Ct. at 851 (Brennan, J., concurring in the judgment). The Circuit Court for the District of Columbia echoed Justice Brennan's comments by holding that intentional concealment is but one factor to be considered in the test for actual bias. *North*, 910 F.2d at 904. The Circuit Court further explained that, as a matter of public policy, it would be wrong to establish a *per se* rule that intentional nondisclosure automatically constitutes actual bias because such a rule would only further encourage defendants to investigate jurors and, thus, may "produce a backlash effect by inducing prospective jurors to evade service." *Id.* at 905.

III. The Presumption of Correctness Due a Trial Court's Findings of Juror Credibility and Impartiality:

Questions regarding the credibility and bias of jurors are questions of fact, and, as such, they are questions to be decided by the trial court. *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891 (1984); *see also McDonough*, 464 U.S. at n. 3, 104 S.Ct. at n. 3 ("Appellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies"). The question to be answered is: "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036, 104 S.Ct. at 2891. In making its determination, the trial court is free to base its finding on the testimony of the juror in question. *Smith v. Phillips*, 455 U.S. 209, 217 & n. 7, 102 S.Ct. 940, 946 & n. 7 (1982); *United States v. Howard*, 752 F.2d 220, 224 (6th Cir. 1985).[4]

If the trial court determines that the juror was fair and impartial, such a determination is entitled to a presumption of correctness. *Patton*, 467 U.S. at 1038, 104 S.Ct. at 2891-2892. In fact, the Supreme Court has stated on numerous occasions that the trial court's resolution of these questions is entitled to special deference. *Id. Rushen v. Spain*, 464 U.S. 114, 120, 104 S.Ct. 453, 456 (1983). The prime reason for this is because "the determination is essentially one of credibility, and therefore largely one of demeanor." *Patton*, 467 U.S. at 1038, 104 S.Ct. at 2892.

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4. [One] may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Dennis v. United States*, 339 U.S. 162, 171, 70 S.Ct. 519, 523 (1950).

Demeanor plays a fundamental role in determining juror credibility and in simply understanding what a juror is saying. *Id.* at n. 14.[5] As the Supreme Court has stated:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed . . . Prospective jurors represent a cross section of the community, and their education and experience vary widely . . . Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially . . . The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id. at 1039, 104 S.Ct. at 2893. Notably, deference to the trial court must operate where a juror's testimony appears ambiguous in the "cold record" because only the trial judge could tell which of the answers given was said with the greatest comprehension and certainty. *Id.* at 1040, 104 S.Ct. at 2893. Because the trial court's factual determinations are entitled to such a high measure of deference, there need be only fair support in the record for the trial court's conclusions regarding the credibility and impartiality of the jurors. *Id.* at 1038, 104 S.Ct. at 2892; *Rushen*, 464 U.S. at 120, 104 S.Ct. at 456.

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5. Because *voir dire* often calls upon lay persons to think and speak in unfamiliar terms, "demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible." *Patton v. Yount*, 467 U.S. 1025, n. 14, 104 S.Ct. 2885, n. 14 (1984).

Appendix D

IV. The Scope of Review:

We turn now to a discussion of the appropriate scope of review to be used for this appeal to the Superior Court. The decision whether to grant a new trial is within the sound discretion of the trial court, and that court's decision will be overturned on review only if it is determined that the court acted capriciously or palpably abused its discretion. *Bell v. Philadelphia Electric Company,* 438 Pa. 286, 288-289, 265 A.2d 516, 517 (1970); *Houseknecht v. Walters,* 404 Pa. Super. 85, 90, 590 A.2d 20, 23 (1991). Only in clear cases of improper conduct by jurors, evidenced by competent testimony, should a verdict, which is fully supported by evidence, be set aside and a new trial granted. *Pittsburgh National Bank v, Mutual Life Ins, Co. of New York,* 273 Pa. Super. 592, 597, 417 A.2d 1206, 1209 (1980), affirmed 493 Pa. 96, 425 A.2d 383 (1981).

V. Analogous Cases:

There are numerous cases from various Circuit Courts of Appeals analogous to ours that are illustrative as to how the *McDonough* test should be applied. In *Ortiz*, cited above, a juror stated to the trial court after the trial that he was not aware that his sister and cousin worked for United States Attorney's Offices and that their vocations had no bearing on his impartiality in the case. 942 F.2d 903, 909 (5th Cir. 1991). Based on the juror's statements, the Fifth Circuit found that the juror answered the *voir dire* question honestly but inaccurately, as permitted under the first prong of the *McDonough* test, and that his familial ties to law enforcement might well not have supported a challenge for cause under the second prong of *McDonough*. *Id.* As a result, the defendants' request for a new trial was denied. *Id.* Similarly, in *Baca,* cited above, the trial court denied the defendant's motion

for a new trial after finding that the juror was not biased because he had testified that he did not believe that the *voir dire* question applied to him and that he did not particularly want to serve on the jury. 821 F.2d 1480, 1482-1483 (10th Cir. 1987). The Tenth Circuit affirmed the trial court's determination because it was supported by the testimony of the juror and because such a factual finding by a trial court is presumed to be correct. *Id.* at 1483.

Also, in *North*, cited above, the trial court found, based on the testimony of the juror in question, that there was no evidence that the juror was biased against the defendant, despite the juror's intentional nondisclosure on *voir dire*. 910 F.2d 843, 903 (D.C. Cir. 1990). The Circuit Court then affirmed the trial court's denial of North's motion for a new trial. *Id.* at 905. Similarly, in *Langford,* cited above, the trial court found that, although the juror had intentionally failed to give truthful information during *voir dire,* she did so only to avoid embarrassment. 990 F.2d 65, 69 (2nd Cir. 1993). The Second Circuit noted that there was no evidence that the juror gave false answers out of any desire to sit on the jury and that there was no evidence that the juror was biased in any way against the defendant. *Id.* at 69-70. Thus, the Circuit Court found that the trial court had properly denied the motion for a new trial. *Id.* at 70.

VI. *Commonwealth v. Hunter:*

Here, we find, as a matter of federal Constitutional law, that the test set forth in *McDonough* is applicable and is controlling in cases of juror nondisclosure on *voir dire* because the Pennsylvania Supreme Court has not addressed this issue and has never established any modified standard under the Pennsylvania State Constitution. Therefore, at the evidentiary hearing on September 23, 1996, Hunter had the burden of showing

that Juror Snyder failed to honestly answer the inquiry on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.

As a threshold matter, we find that, even if Juror Snyder had disclosed his wife's experiences on *voir dire*, this would not have provided a valid basis for a challenge for cause. The entire jury panel was asked if there was any reason that they could not be fair and impartial in this case knowing that it involved allegations of child abuse. (N.T. 5/30/95 at 8). Later in the process, the panel was again asked if there was anything at all that would prevent them from being fair and impartial in a case such as this. *Id.* at 26. Also, the panel was asked if there was anything related to sex that would keep the jurors from being fair and impartial. *Id.* at 27-28.

Juror Snyder did not answer yes to any of these three queries, and, at the evidentiary hearing, he credibly testified that he had, in fact, answered those questions truthfully. (N.T. 9/23/96 at 64). In addition, it must be remembered that it was his wife and her sister that had been victims of molestation, not Juror Snyder. Moreover, this molestation occurred almost half a century ago before Juror Snyder had ever met his future wife. As a result, we find this to be far too indirect and attenuated to support a challenge for cause. Therefore, because there was no indication that Juror Snyder could not be fair and impartial, any challenge for cause would have been rejected outright. Accordingly, Hunter's claim completely fails the second prong of the *McDonough* test.

In the alternative, Hunter claims that he was denied his right to an impartial jury because, had Juror Snyder disclosed his wife's experiences, the defense would have utilized a peremptory challenge to strike him from the jury. We find that, under

McDonough, this argument lacks merit because the Supreme Court has determined that actual prejudice must be established and that the speculative loss of a peremptory challenge does not rise to the level of actual bias. Indeed, if the defense had exercised a peremptory strike against Juror Snyder, they would have necessarily waived one of their other peremptory challenges, thus allowing another juror to be empaneled whom the defense found to be unacceptable. We also note that the defense declined to request individual *voir dire* in this case. Moreover, if the defense team had been so concerned about any potential jurors' possible experiences with child molestation, they should have asked more precise follow-up questions to the query posed by this Court. The defense was, indeed, free to ask such follow-up questions but failed to do so, and, as the Supreme Court has stated:

> A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination.

McDonough, 464 U.S. at 548, 104 S.Ct. at 850. Therefore, our analysis under *McDonough* should properly end here, and Hunter should not be granted a new trial.

However, we will, nevertheless, proceed further in our analysis under *McDonough* in order to show that Hunter's claim utterly fails the remainder of the test, as well. The *McDonough* test requires that Hunter prove that Juror Snyder failed to answer honestly the voir dire question and that he was actually biased. As described in detail above, questions regarding the credibility

and impartiality of jurors are questions of fact to be decided by the trial court, and the trial court is free to base its determinations upon the demeanor and testimony of the juror in question. Also, such determinations by the trial court must be afforded a strong presumption of correctness.

At the evidentiary hearing, when he was asked about his lack of response to the *voir dire* question concerning child molestation, Juror Snyder testified that he did not remember the exact phrasing of the question (N.T. 9/23/96 at 25 & 26) and that he may have misinterpreted the question. *Id.* at 27. Snyder stated that he may have misinterpreted the question as asking whether he, himself, had ever been the victim of or been accused of or been a witness to child molestation, to each of which the accurate answer was no. *Id.* at 57. Juror Snyder also testified that, as he understood the question, he did not believe that it applied to him. *Id.* at 29 & 70. He explained, "I can't see how an incident that happened to my family would have any bearing on this man's case," *Id.* at 32, and further, I could not see where what happened to my wife 45 years ago or longer than that had any bearing on this case." *Id.* at 54.

In addition, Juror Snyder stated that he did not feel uncomfortable when the question was posed to the jury panel. *Id.* at 31. He was also asked if the subject matter of the trial had any effect on him when he first learned of it, and he replied, "I can't say it had an affect on me." *Id.* at 28. When asked about his answers to the other general *voir dire* questions regarding impartiality, Juror Snyder testified that he had answered truthfully each time that he knew of no reason why he could not be a fair and impartial juror in this case. *Id.* at 64. Lastly, when asked if he wanted to be on this jury, Juror Snyder replied that he had no desire to be selected for the jury and that he was simply doing his civic duty. *Id.* at 34.

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Based upon his demeanor and testimony at the evidentiary hearing, we find that Juror Snyder was quite credible and that he did, in fact, answer the question on *voir dire* honestly and to the best of his knowledge. Again, we note that an honest but incorrect answer on *voir dire is* not, alone, grounds for a new trial. As the Supreme Court explained, "To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *McDonough,* 464 U.S. at 548, 104 S.Ct. at 849-850. Therefore, we find that Hunter has failed to bear his burden under the first prong of the *McDonough* test.

Even assuming arguendo that Juror Snyder did knowingly fail to answer the question on *voir dire,* the Defendant still had the burden of proving actual bias. In that regard, we find that Juror Snyder did not have any desire to be selected for this jury and that his nondisclosure on *voir dire* was, in no way, meant to achieve this end. Moreover, we find that Juror Snyder was not, in any way, biased against Hunter. He was asked repeatedly on *voir dire* whether he could be fair and impartial in this case, and Juror Snyder credibly testified that he had answered truthfully each time that he knew of no reason why he could not be a fair and impartial. (N.T. 9/23/96 at 64). Therefore, we find that a new trial is also not warranted because Hunter has failed to carry his burden of proving actual bias under the *McDonough* test.

Again, it should be noted that our determinations as to Juror Snyder's credibility and impartiality are presumed to be correct. In addition, our decision not to grant Hunter's request for a new trial should not be disturbed absent a showing that we have acted capriciously or that we have palpably abused our discretion. We submit that Hunter has made no such showing, and, under such a

narrow scope of review, it is clear that this Court's Order denying Hunter's Motion for a New Trial should be upheld.

Despite the fact that we find that the *McDonough* test is dispositive of the issue involved here and that our inquiry need go no further, nevertheless, we would be remiss if we neglected altogether the notion of implied bias. The Tenth Circuit has pointed out that, although the test articulated by the Supreme Court in *McDonough* serves as the primary means for assessing cases involving juror nondisclosure on *voir dire,* some courts have granted new trials due to juror nondisclosure under the doctrine of implied bias. *Gonzales v. Thomas,* 99 F.3d 978, 985 (10th Cir. 1996). Under this concept, the party seeking a new trial may establish actual bias "by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *United States v. Nell,* 526 F.2d 1223, 1229 (5th Cir. 1976). Whether implied bias exists in a juror is a legal determination. *Burton v. Johnson,* 948 F.2d 1150, 1158 (10th Cir. 1991). The answer turns on an objective evaluation of the challenged juror's experiences and their relation to the case being tried. *Gonzales,* 99 F.3d at 987. Also, in addition to the similarity of the circumstances experienced by the juror, another factor to be considered is how close in time those experiences were to the trial at issue. *Id.* at 991; *Hunley v. Godinez,* 975 F.2d 316, 320 (7th Cir. 1992). A juror who has been similarly victimized close to or at the time of the trial at issue "is more likely to harbor actual bias than a juror who has been victimized years earlier." *Hunley,* 975 F.2d at 320. Also, the passage of a quarter-century between the time of the juror's victimization and the time of the trial at issue argues against the presumption of bias. *Gonzales,* 99 F.3d at 991; *see also Amirault v. Fair,* 968 F.2d 1404, 1405-1406 (1st Cir. 1992) (in a case involving child molestation, a juror who had been raped forty years ago when she was fourteen years old was not found to be impliedly biased).

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It is important to note that the doctrine of implied bias is not to be invoked lightly. *Gonzales*, 99 F.3d at 987. "It must be reserved for those 'extreme' and 'exceptional' circumstances that 'leav[e] serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.' " *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 222 & n. *, 102 S.Ct. 940, 948-949 & n. * (1982) (O'Connor, J., concurring)). Indeed, the implied bias test should rarely apply. *Hunley*, 975 F.2d at 320. According to Justice O'Connor, scenarios that would support a finding of implied bias "might include a revelation that the juror is an actual employee of the prosecuting, agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 222, 102 S.Ct. at 948 (O'Connor, J., concurring).

It is clear from Justice O'Connor's words that she would find implied bias only in cases where the juror has a direct personal connection to the individual parties or to the trial, itself.[6] In contrast, some lower courts have chosen to stretch the doctrine and to imply bias in cases where the circumstances of the trial at issue are extremely similar to circumstances that have been experienced personally by the juror in question.[7] However, these

6. *See, e.g., United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (jurors were found to be biased because they worked for the same bank that was robbed).

7. *See United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979) (in a case involving heroin trafficking, juror presumed biased because his own sons were currently imprisoned for heroin-related crimes); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968) (in a case where the defendant was convicted of murdering his former wife following her involvement in a love triangle, juror

(Cont'd)

cases are easily distinguishable factually from the case at hand because all involved incredibly similar circumstances that were experienced by the juror, *himself.* None of these courts have gone so far as to find implied bias where the circumstances at trial happened to be of a similar nature to those experienced five decades earlier by the juror's wife, and not by the juror.[8] Certainly, the Superior Court should decline to stretch this doctrine to such an extreme, especially in a case such as this one where the evidence against the Defendant was, indeed, so overwhelming.

One of the cases upon which Hunter relies is *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991). However, we find that *Burton,* too, is distinguishable from our case. In *Burton,* a woman who was convicted of murdering her abusive husband requested a new trial due to juror nondisclosure. *Id.* at 1154. The Tenth Circuit found the juror to be impliedly biased because she had

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(Cont'd)

presumed biased because he, himself, had been involved in a similar love triangle that resulted in the murder of the woman by her husband only six months prior to the trial at issue); *United States ex rel, De Vita v. McCorkle,* 248 F.2d 1 (3rd Cir.), *cert. denied,* 355 U.S. 873, 78 S.Ct. 121 (1957) (in a case of armed robbery and murder where the victims were attacked while making a nightly deposit, juror was found to be biased because, only seven months before, the juror, himself, had been robbed while making a nightly deposit on the same street at another branch of the same bank and because the case "vividly" reminded juror of his robbery experience); *State v. LaRue,* 722 P.2d 1039 (Hawaii 1986) (in child molestation case, juror was found to be biased because she, herself, had been the victim of child molestation and because she was able to recall those events).

8. It is important to note that, of these cases, only one carries more than persuasive authority, and that one case from the Third Circuit was decided some twenty-seven years before *McDonough.* Of the other cases, none are binding on the Superior Court, and all but one was decided prior to *McDonough.*

been the victim of similar spousal abuse for many years and because that abuse was ongoing at the time of the trial. *Id.* at 1159. The wife was then granted a new trial. *Id.*

In stark contrast, our case involves a juror who had never been the victim of any kind of abuse at all. (N.T. 9/23/96 at 57). Juror Snyder simply married a woman who had been the victim of child molestation long before he had ever met her. In fact, at the time of Hunter's trial, approximately forty-five to fifty years had passed since Juror Snyder's wife had been the victim of child molestation. *Id.* at 54. Therefore, unlike the juror in *Burton*, Juror Snyder had absolutely no direct experience with child molestation, let alone the contemporaneous and ongoing direct experience with abuse of the juror in *Burton*. For these reasons, we find that the doctrine of implied bias is not applicable here.

Hunter also relies upon *Commonwealth v. Rosario,* 198 Pa. Super. 177, 182 A.2d 75 (1962), to support his assertion that a new trial was warranted. However, we agree with the Superior Court's previous determination that *Rosario* is easily distinguishable from the case at hand. *Commonwealth v. Hunter,* No. 03423, at 19 (Pa. Super. April 29, 1996). In addition, we would point out that *Rosario* was decided some twenty-two years prior to the United States Supreme Court's decision in *McDonough* and is, thus, of doubtful precedential value.

In addition, the Defendant relies upon a number of other cases from other jurisdictions which also are of questionable persuasiveness in light of their distinguishable facts, *see Salazar v. State*, 562 S.W. 480, 481 (Tex. Crim. App. 1978) (in a case involving a sexual offense against a minor girl by a Mexican-American defendant, juror was deemed partial because the juror, himself, was an eyewitness to a sexual assault on his

own daughter by a Mexican-American male only five years before), or their applicable law, *see Johnston v. State,* 239 Ind. 77, 155 N.E.2d 129 (1958) (in a first-degree murder case, new trial was granted because juror failed to disclose that she, herself, was the second cousin of the victim which made her incompetent to serve as a juror under an Indiana statute), or both, *see State v. Adams,* 10 Haw. App. 593, 880 P.2d 226 (1994) (in a case involving sexual assault where the Hawaii court only applied state law, juror was presumed biased because she failed to disclose that she, herself, had been the victim of four sexual assaults, the most recent one occurring when she was twenty-two years old). To the extent that these cases are based upon the concept of implied bias, all are akin to *Burton* in that the similar circumstances between the jurors and the trial had all been experienced personally by the jurors, themselves. Therefore, as explained in the above discussion of *Burton*, these cases are all factually distinguishable from the case at hand. Clearly, implied bias has no place here.

As stated previously, we find that the controlling standard in cases of juror nondisclosure on *voir dire* is the one set forth in *McDonough,* and, under that standard, we find that Hunter is not entitled to a new trial. But, even if the Superior Court chose to utilize the more lenient standard of granting a new trial based solely on a juror's knowing failure to disclose on *voir dire,* we find that a new trial would still not be warranted for many of the same reasons. Again, based upon his demeanor and testimony at the evidentiary hearing, we find that Juror Snyder was quite credible and that he answered the question on *voir dire* honestly and to the best of his knowledge. Therefore, we find that Juror Snyder did not knowingly fail to answer, nor did he knowingly deceive this Court. Furthermore, this determination by the trial court is to be reviewed under the narrow abuse of discretion standard. Clearly, Hunter has failed to show that we have acted capriciously or that we have palpably abused our discretion.

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CONCLUSION

After a full hearing and a thorough review of this matter, this Court finds that Juror Snyder did not fully understand the question posed on *voir dire* and did not believe that it applied to him. As a result, we find that Juror Snyder answered the question honestly and to the best of his knowledge and that he did not knowingly fail to respond or knowingly deceive this Court during *voir dire*. Furthermore, based upon the very credible testimony given by Juror Snyder, we find that his wife's experiences from long ago did not prevent him from being fair and impartial at Hunter's molestation trial. Moreover, because the evidence presented at trial against Hunter was so overwhelming, this Court finds that the integrity of the trial was not impugned in any way. The Defendant received a fair trial which lasted almost two weeks; he was convicted by an impartial jury of his peers; and his conviction was affirmed by the Superior Court. Therefore, we find that Hunter has failed to show that this Court abused its discretion by denying his Motion for a New Trial. Lastly, we find that justice demands that the young victim in this case not be forced to relive the nightmare of the atrocities committed against her by Hunter through yet another agonizing trial. Accordingly, this Court's Order denying the Defendant's request for a new trial should be upheld.

BY THE COURT:

s/ Bernard A. Moore

DATED: February 3, 1997 BERNARD A. MOORE, J.

cc: Bruce L. Castor, Jr., Esquire, First Assistant District Attorney
Mary MacNeil Killinger, Esquire, Executive Assistant District Attorney
Gavin P. Lentz, Esquire
Richard D. Winters, Esquire
Marc Durant, Esquire
Frank DeSimone, Esquire

APPENDIX E — JUDGMENT AND MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED APRIL 29, 1996

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 03423 Philadelphia 1995

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT HUNTER,

Appellant

Appeal from the Order Entered October 5, 1995, in the Court of Common Pleas of Montgomery County, Criminal, No. 1438-94

BEFORE: McEWEN, P.J., TAMILIA, and BROSKY, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of MONTGOMERY *County be, and the same is hereby* AFFIRMED. CASE REMANDED FOR AN EVIDENTIARY HEARING. JURISDICTION RELINQUISHED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: April 29, 1996

Appendix E

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 03423 Philadelphia 1995

COMMONWEALTH OF PENNSYLVANIA

v.

ROBERT HUNTER,

Appellant

Appeal from the Order Entered October 5, 1995, in the Court of Common Pleas of Montgomery County, Criminal, No. 1438-94

BEFORE: McEWEN, P.J., TAMILIA, and BROSKY, JJ.

MEMORANDUM:

Appellant Robert Hunter appeals from the judgment of sentence to serve a term of imprisonment of from 8 years to 16 years and to pay $50,000 in fines, imposed after a jury found him guilty of a multitude of crimes involving the sexual abuse of the 11-year-old daughter of his paramour.[1] We affirm and remand for an evidentiary hearing consistent with this Memorandum.

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1. Specifically, the trial court sentenced appellant to consecutive sentences: 1) of from 5 years to 10 years for indecent sexual intercourse, 2) of from 6 months to 1 year for indecent assault, 3) three sentences of from 6 months to 1 year for three counts of corruption of the morals of a minor, and 4) two sentences of from 6 months to 1 year for two counts of endangering the welfare of a child.

(Cont'd)

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The distinguished Judge Bernard A. Moore has ably summarized the history of this appeal as follows:

> The defendant's convictions stemmed from specific incidents involving himself and (T.K.]. On February 4, 1994, [T.K.] filed a complaint against the defendant of occasions between 1988 and 1994. [T.K.1 recalled three of these instances specifically: September 11, 1993, December 25, 1993, and January 14, 1994. At the time she made the complaint, [T.K.] was eleven years old. The defendant had been romantically involved with [J.K.'s] mother, [J.K.], for a number of years. An investigation into these charges was initiated by the Montgomery County Detective Bureau. This included an electronic interception of a conversation between the defendant and [J.K.] on February 6, 1994. [J.K.] consented to the interception which took place inside of her home. Her sister, [D.C.], was also present on that day) . The defendant was arrested on February 9, 1994, and subsequently held over for trial.
>
> At the trial, the Commonwealth presented a great deal of evidence in the form of witness testimony. This included testimony by [L. B.], a young friend of [T. K.'s] who recalled the evening when [T.K.] first related the defendant's misconduct. Dr. Allan DeJong, a pediatrician specializing in child sexual abuse, offered an expert opinion that [T.K.'s] physical condition was consistent with the type of sexual

(Cont'd)
The trial court also imposed concurrent sentences upon another count of indecent sexual intercourse, two counts of indecent assault, and one count of endangering the welfare of a child.

contact she had described. He went on to conclude, however, that her condition was non-specific, as it could have been caused by other factors as well. [J.K.] testified in detail about her relationship with the defendant, and was extensively cross-examined about her own personal life and motivations with respect to this case.[1]

---

1. A brief background summary may be useful as the facts surrounding this case are somewhat complex. At the time the allegations of sexual abuse were made against him, the defendant was the subject of a Securities and Exchange Commission (SEC) investigation. The SEC probe concerned the defendant's possible use of insider information with regard to a bank stock transaction. John Heffernan was one of the SEC agents investigating the defendant. Mr. Heffernan questioned [J.K.] as part of the investigation. He later became romantically involved with [J.K.] and they were eventually married. Mr. Heffernan was removed from the case involving the defendant when his relationship with [J.K.] was disclosed.

Further, [J.K.] filed a civil lawsuit against the defendant on behalf of herself and [T.K.] in Delaware County. The suit covered the same allegations first raised *in* the criminal complaint and set damages in excess of three million dollars. At the criminal trial, the defendant argued that the charges against him were part of a scheme concocted by [J.K.] and John Heffernan. The defendant contended that they coerced [T.K.] into making these allegations in order to extort a large sum of money from him.

The most probative evidence, however, came through the testimony of [T.K.]; along with the audiotape of the aforementioned intercepted conversation between [T.K.] and the defendant.

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[T.K.] testified during her direct examination that the defendant had been sexually molesting her from the time she was in first or second grade. The first episode occurred in a swimming pool in Florida. From that occasion until the time of her disclosure, [T.K.] testified that the defendant had touched and licked her breasts and vagina, had made her touch his penis and put his penis in her mouth. [T.K.] could not be specific as to the number of times the defendant sexually assaulted her. She did testify that the molestations took place at the defendant's homes in Huntington Valley, Pennsylvania, Stuart, Florida, and Stone Harbor, New Jersey. The three episodes about which [T.K.] testified in detail, and for which the defendant was charged, occurred at the home in Huntington Valley. [T.K.] testified that on September 11, 1993, the defendant came into the master bedroom where she was watching television. He told her to take off her clothes, whereupon he touched her vagina. As far as she knew, she and the defendant were alone in the house because her mother had left earlier to attend a wedding. The second episode occurred on Christmas Day, 1993. [T.K.] testified that on that evening she went into the room where the defendant kept his desk in order to retrieve a Christmas card for her mother, who had already gone to bed. The defendant came in behind her and shut the door. He told her that if she did not put his penis in her mouth, he would not wish her mother a Merry Christmas or give her a card. [T.K.] testified that she complied, and after this assault the defendant gave her money to put in the card for her mother. The final episode of molestation occurred on January 14, 1994. [T.K.]

testified that she and her friend [M.M.] were spending the night at the defendant's home. The next day, they were all to fly to Florida for a vacation. [T.K.] asked the defendant if they could go to Bertucci's, her favorite restaurant, for dinner that evening. The defendant told her to follow him into his room. Once they were in his room, the defendant took [T.K.] into his bathroom and told her that if she did not put his penis into her mouth, he would not take her and her friend to the restaurant. [T.K.] testified that she once again complied with the defendant's demand.

When asked why she waited so long before coming forward, [T.K.] stated that she was afraid that her mother would not believe her and be angry. She was also concerned that her mother would have to return to her job as a waitress. Additionally, [T.K.] testified that, despite the consequences, she decided that she did not want the abuse by the defendant to continue. She finally told her friends [M.] and [L.] during a slumber party. The two girls corroborated this account through their own testimony.

The audiotape of the intercepted conversation offered as evidence at the trial also served to prove the allegations made by [T.K.] The tape was recorded on February 6, 1994 by Detective Joseph Ryan of the Delaware County Detective Bureau and Katherine Hart of the Montgomery County Detective Bureau. The audiotape contained a recording of a conversation the defendant had with [J.K.] and her sister, [D.C.] . The defendant made certain admissions that, while not addressing the specific instances described by

> [T.K.], did infer a strong likelihood of sexual misconduct with the girl.

Appellant raises the following claims of error in the brief submitted to this Court:

> In a case involving allegations of child molestation, the *voir dire* process was tainted by Juror Snyder's failure to disclose personal experiences with child molestation when asked the following:
>
> > Have any of you or members of your family or close personal friends had any experience relating to allegations of child molestation either as a victim, or a witness or an accused?
>
> A juror's false statements during *voir dire* about his experiences with child molestation deprived Mr. Hunter of his Sixth Amendment right to trial by a fair and impartial jury.
>
> The trial court abused its discretion by failing to grant a hearing on the issue of juror misconduct, in violation of Mr. Hunter's due process rights.
>
> The trial court's admission of a secretly recorded audio tape containing conversations with Mr. Hunter relating to uncharged conduct occurring in Florida constitutes reversible error.
>
> The trial court's denial of Mr. Hunter's motion to suppress an audio tape on grounds that it was

obtained in violation of Pennsylvania's Wire Tap Act, and on the grounds that it was incomplete and inaudible due to a malfunction in the recording device, constitutes reversible error.

The Commonwealth's use of "pedophile" to describe Mr. Hunter in closing argument constitutes reversible error.

The trial court's refusal to instruct the jury on *res judicata* as related to the victim's bias (from a $3 million dollar lawsuit filed by her against Mr. Hunter based on these criminal charges) constitutes reversible error.

The trial court's refusal to allow Mr. Hunter to impeach key prosecution witness [D.C.] relating to a $50,000 loan she demanded from Mr. Hunter constitutes an abuse of discretion.

Where an appeal is likely to be successful, and where the accused presents no risk of flight, nor any danger to the community, the trial court's refusal to grant Mr. Hunter (who is 66 years old and in ill health) bail pending resolution of his appeal constitutes an abuse of discretion.

We begin our analysis of the arguments of appellant by a consideration of those claims which, if successful, would result in a new trial.

Appellant argues that the Commonwealth's use of the term "pedophile" to describe appellant during closing argument

constituted prosecutorial misconduct. A prosecutor's remarks during closing argument do not require a new trial, "unless the unavoidable effect would be to prejudice the jurors, creating in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render an impartial verdict. *Commonwealth v. Pelzer*, 531 Pa. 235, 612 A.2d 407, 416 (1992).

> It is well established that a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her arguments with "logical force and vigor." *Commonwealth v. Smith,* 490 Pa. 380, 387, 416 A.2d 986 (1980), *quoting Commonwealth v. Cronin*, 464 Pa. 138, 143, 346 A.2d 59, 62 (1975). Counsels' remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. *Commonwealth v. Fairbanks,* 453 Pa. 90, 306 A.2d 866 (1973); *Commonwealth v. Stevens,* 276 Pa.Super. 428, 419 A.2d 533 (1980). The prosecutor may always argue to the jury that the evidence establishes the defendant's guilt, *Commonwealth v. Capalla,* 322 Pa. 200, 185 A.2d 203 (1936) although a prosecutor may not offer his personal opinion as to the guilt of the accused either in argument or in testimony from the witness stand. *Commonwealth v. DiNicola,* 503 Pa. 90, 468 A.2d 1078 (1983) ; *Commonwealth v. Pfaff,* 477 Pa. 461, 384 A.2d 1179 (1978); *Commonwealth v. Cronin, supra.* Nor may he or she express a personal belief and opinion as to the truth or falsity of evidence of defendant's guilt, including the credibility of a witness. *Commonwealth v. Kuebler,* 484 Pa. 358, 399 A.2d

116 (1979)(where defendant's version of events was branded a "big lie") ; ABA Standards for Criminal Justice, Standards Relating to the Prosecution Function Section 5.8(b)(Approved Draft, 1971).

However, not every intemperate or uncalled for remark by the prosecutor requires a new trial. As we have stated many times:

> [C]omments by a prosecutor do not constitute reversible error unless the "unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." *Commonwealth v. Anderson, supra* at 501 Pa. [275, at] 282, 461 A. 2d [208, at] 211 (1983] ; *Commonwealth v. Upsher,* 497 Pa. 621, 627, 444 A.2d 90, 93 (1982).

Commonwealth v. Carpenter, 511 Pa. 429, 439, 515 A.2d 531 (1986); *Commonwealth v. D'Ambro,* 500 Pa. 303, 309-10, 456 A.2d 140 (1983). Furthermore, the prejudicial effect of the prosecutor's remarks must be evaluated in the context in which they occurred. *Commonwealth v. Carpenter, supra,* 511 Pa. at 439, 515 A.2d 531, *quoting Commonwealth v. Smith, supra,* 490 Pa. at 388, 416 A.2d at 989. As the United States Supreme Court has stated:

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> The "consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.
>
> *Donnelly v. DeChristoforo,* 416 U.S. 637, 646-47, 94 S.Ct 1868, 1873, 40 L.Ed.2d 431 (1974).

Commonwealth v. D'Amato, 514 Pa. 471, __, 526 A.2d 300, 309-10 (1987).

The challenged remarks of the prosecutor in the instant case were neither improper nor prejudicial when viewed in light of the arguments of defense counsel and when read in the context of the entire closing argument of the prosecutor. Specifically, appellant

first contends that the Commonwealth committed prosecutorial misconduct in arguing, "[b]ut you know what [T.K's] initial reaction is when a little girl finally gets this off her chest, a little girl who has been seduced, a little girl — yeah, she loved this man. She liked the attention, but that's how they control. That's how a pedophile controls the object of his lust, control and love and affection." When read in context, however, this statement merely addressed and rebutted the defense theory that the evidence pointed to a healthy, loving relationship between T.K. and appellant and offered an explanation for T.K.'s conduct.

Appellant also challenges the final remark of the prosecutor that, "[i]f you look at the evidence and see how things developed, I have no doubt that you will do the right thing. That man is guilty. That man is a pedophile and should be convicted of these charges." We note that appellant states no specific claim that the prosecutor engaged in misconduct when she stated, "[t]hat man is guilty[,]" but we nonetheless address the comment in combination with the "pedophile" comment.

The initial determination as to whether a prosecutor engaged in misconduct rests within the sound discretion of the trial court, and "our inquiry of necessity must turn to whether an abuse of discretion was committed [by the trial court]." *Commonwealth v. Strong*, 522 Pa. 445, 454, 563 A.2d 479, 483 (1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1536, 108 L.Ed.2d 775 (1990). The Supreme Court of Pennsylvania has established the following fundamental guidelines:

> A prosecutor's remarks fall within the ambit of fair comment if they are supported by evidence and they contain inferences which are reasonably derived from that evidence. *Commonwealth v. Barren*, 501 Pa. 493,

> 462 A.2d 233 (1983). A new trial is not mandated every time a prosecutor makes an intemperate or improper remark. To constitute reversible error, the language must be such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant, so that they could not weigh the evidence and render a true verdict. *Commonwealth v. Dreibelbis,* 1493 Pa. 466, 426 A.2d 1111 (1981).

Commonwealth v. Hardcastle, 519 Pa. 236, __, 546 A.2d 1101, 1109 (1988), *cert. denied,* 493 U.S. 1093, 110 S.Ct. 1169, 107 L.Ed.2d 1072 (1990).

Instantly, the grievance of appellant is quite valid. The reference is not simply improvident or intemperate, it was improper. Moreover, it was improper expression by the trial prosecutor of his personal opinion of the guilt of appellant. The Supreme Court has proscribed such remarks noting that "expressions of personal belief . . . have no legitimate place in a district attorney's argument." *Commonwealth v. Linscomb,* 455 Pa. 525, __, 317 A.2d 205, 207 (1974) *quoting Commonwealth v. Capalla,* 332 Pa. 200, 185 A. 203 (1936). Nonetheless, a new trial is not mandated in this case since the error was fleeting, was not unduly prejudicial, and the trial judge provided the following instruction in his charge to the jury concerning the import of counsel's statements:

> However, you are not required to accept the arguments of either lawyer. It is for you and you alone to decide the case based upon the evidence as it was presented from the witness stand and in accordance with the instructions that I am now giving to you. Personal

> beliefs of counsel, if expressed, as to the guilt or innocence of the defendant are not to be considered for any purpose whatever in your deliberations.

The fact of this instruction and our conclusion that the remark did not form in the minds of the jurors a "fixed bias and hostility towards" appellant, requires that we reject the contention that a new trial is required as a result of this contention. *Commonwealth v. Williams,* 500 Pa. 226, __, 455 A.2d 632, 634 (1983).

Appellant next claims that the trial court committed reversible error when it refused to instruct the jury on the *res judicata* effect a criminal conviction would have on the pending civil action filed against appellant by T.K. We disagree. Requests for jury instructions and the charge to the jury are governed by Pa.R.Crim.P. 1119:

> (a) Any party may submit to the trial judge *written requests for instructions* to the jury. Such requests *will be submitted within a reasonable time before the closing arguments,* and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.
>
> (b) *No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate.* All such objections shall be made beyond the hearing of the jury.

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Pa.R.Crim.P. 1119 (a) and (b) (emphasis supplied) . Appellant, in his brief, asserts that, "[b]efore the jury was excused to deliberate, the defense requested Judge Moore to charge the jury on the law as it pertains to the *res judicata* effect of a criminal conviction in a subsequent civil proceeding." Our review of the record reveals the following sequence of events:

> THE COURT: . . . [Jury Charge].
>
> Counsel, at this point are there any additions or corrections?
>
> MR. SCIOLLA: Yes, Your Honor, if we may see you.
>
> THE COURT: Sure, I will see counsel in chambers for a minute.
>
> - - -
>
> (Discussion was held in chambers off the record.)
>
> - - -
>
> * * * *
>
> And we would excuse you at this point to begin your deliberations in regard to this matter.
>
> (At 12:55 p.m., the jury was excused to commence its deliberations.)

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THE COURT: The record should reflect the jury has been excused.

Mr. Sciolla, did you want to make a comment?

MR. SCIOLLA: Yes, Your Honor, if I may. On behalf of the defendant, we request that a charge with regard to the issue of res judicata. . . .

THE COURT: This has not been submitted to the Court as a point for charge.

MR. SCIOLLA: No, Your Honor, we did not submit it, and I indicated that to the Court prior to the dismissal of the jury that we were requesting to quickly put that charge to the jury.

The transcript, thus, reveals that (1) the first request for a *res judicata* instruction was made, off the record, after the court had charged the jury, and (2) no written request for a *res judicata* instruction was ever submitted. Thus the trial court did not abuse its discretion when it denied the request for an instruction a *res judicata* where appellant did not comply with Pa.R.Crim.P. 1119. Moreover, even if appellant had properly submitted a request for charge on the issue of *res judicata,* the trial court could properly reject such a request. In reviewing a jury charge, we "evaluate whether the charge sufficiently and accurately [apprises] a lay jury of the law it must consider in rendering its decision." *Commonwealth v. Owens,* 437 Pa.Super. 64, __, 649 A.2d 129, 136 (1994), *allo. denied,* __ Pa. __, 656 A.2d 118 (1995). It was not necessary for the jury to consider the *res judicata* consequences of a criminal conviction upon a civil proceeding in order to render a decision in the instant prosecution where the

issue of the possible bias and motive of the victim and her family had been thoroughly covered through cross-examination at trial and specifically addressed in the charge of the court.

Appellant also claims that the trial court erred in refusing the request of appellant to be released on bail after sentencing, but pending further proceedings. Release on bail following sentencing is governed by Pa.R.Crim.P. 4010 B(2):[2]

> RULE 4010. BAIL AFTER FINDING OF GUILT
>
> * * * *
>
> B. After Sentencing
>
> * * * *
>
> (2) Except as provided in Section A (1), when the sentence imposed includes imprisonment of two years or more, the defendant shall not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge.

Pa.R.Crim.P. 4010 B(2) . Thus, Rule 4010 provides for bail to be granted at the discretion of the trial judge. The trial judge, in compliance with Rule 4010 C, denied bail for the following reasons:

> The defendant has been convicted of multiple counts of sexual abuse and molestation of an 11-year-old girl. The defendant has a prior conviction for indecent assault.

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2. Effective April 1, 1996, Rule 4010 will be renumbered as Rule 4009.

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> The nature of the offenses which the defendant stands convicted of, that is in this case, molesting of children, is indicative of the danger he represents to the community.
>
> Sentencing has now occurred. A substantial prison sentence imposed increases the likelihood of the defendant's flight. A successful appeal of the defendant's conviction is unlikely.
>
> Accordingly, considering the totality of circumstances, the court in the exercise of its discretion determines it would be appropriate to deny bail pending the filing of post-trial motions or appeal.

We agree and, accordingly, reject this claim as meritless.

Similarly meritless is the contention of appellant that the trial court erroneously refused to "grant a bench warrant for a duly subpoenaed witness who would have confirmed facts clearly indicating . . . bias . . . , but also demonstrating that [D.C.] knowingly perjured herself. . . ." It is clear, as appellant contends, that where guilt or innocence pivots upon the credibility of prosecution witnesses, it is of great importance that appellant be allowed to demonstrate the bias of Commonwealth witnesses through cross-examination. *Commonwealth v. Davis*, 438 Pa.Super. 425, __, 652 A.2d 885, 888 (1995). It merits emphasis, however, that appellant never sought to cross-examine D.C. concerning the root of her bias, namely, her alleged request for a loan which was refused by appellant. Instead, appellant proceeded to attempt to present extrinsic evidence of such bias by seeking a bench warrant for another witness.

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The record is devoid of any suggestion of the reason for the decision by counsel to forego the cross-examination of D.C. on the subject of her bias, for no restriction was imposed by the court upon such cross-examination and such evidence would have been admissible. As we have repeatedly noted, questions concerning the admissibility of evidence are within the sound discretion of the trial court, whose decision thereon will not be reversed on appeal absent an error of law or a clear abuse of discretion. *Commonwealth v. Patosky,* 440 Pa. 535, __, 656 A.2d 499, 504, *allo. denied,* 668 A.2d Super. 1128 (1995). It is well settled that inquiry into topics tending to show bias or motive to fabricate is permissible on cross-examination. Appellant, in contrast, sought to establish motive through the introduction of extrinsic evidence, *without first attempting to cross-examine* the witness concerning her possible motive to fabricate.

The argument of appellant triggers recall of the Rule in Queen Caroline's Case which requires a witness to be asked first, upon cross-examination, whether the witness has made a prior inconsistent statement before counsel may be permitted to introduce extrinsic evidence of the inconsistency. *Robert v. Chodoff,* 259 Pa.Super. 332, __, 393 A.2d 853, 867 (1978). This rule is no longer absolute in Pennsylvania and instead the trial court determines within its sound discretion whether to allow impeachment without first requiring that a foundation be established through cross-examination. *Robert. v. Chodoff, supra* at __, 393 A.2d at 867. The three-fold purpose of this rule may still be considered by the trial court in deciding whether to admit such evidence, namely: (1) to avoid unfair surprise, (2) to save time, as an admission by a witness would render the introduction of extrinsic proof unnecessary, and (3) to afford the witness an opportunity to explain any discrepancy. *Robert v. Chodoff, supra* at __, 393 A.2d at 867. These principles are surely applicable in

the present case. However, the testimony of D.C., concerning the refused loan, was never elicited by counsel for appellant during cross-examination and, therefore, the entire purpose of the rule was circumvented.

This Court, in *Commonwealth v. Shepherd,* 269 Pa.Super. 291, 409 A.2d 894 (1979), addressed an argument similar to the argument urged upon us by appellant. The defendant there did not cross-examine a Commonwealth witness concerning his motive for testifying but then attempted to cross-examine a subsequent Commonwealth witness' concerning the bias or motive of the preceding witness. *Commonwealth v. Shepherd, supra* at __, 409 A.2d at 897. This Court found that under such circumstances, "[w]here appellant had available to him an opportunity to impeach a Commonwealth witness, which opportunity was forgone, he may not be heard to complain that he was prevented from asking another witness a question. . . ." *Commonwealth v. Shepherd, supra* at __, 409 A.2d at 897. We find this reasoning persuasive in the case before us. Appellant was provided the opportunity to impeach the witness during cross-examination, but declined to do so for reasons not apparent in the record. The trial judge, where there was no explanation for the failure to question D.C. on the subject, acted well within his discretion in refusing to issue a bench warrant for a witness whose testimony would have been collateral to the instant case.[3]

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3. Moreover, where such impeachment would require the issuance of a bench warrant for a collateral witness, we are mindful of the limitation on the right to compulsory process recognized by our Supreme Court:

> The right to compulsory process guarantees the defendant process to obtain witnesses in his favor but does not grant a defendant the right to secure the attendance and testimony of any and all witnesses. *Commonwealth v. Allen,* 501 Pa. 525, 462 A.2d 624

(Cont'd)

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Appellant further frames a litany of errors committed by the trial court in admitting the audiotape of a conversation between appellant, J.K., the mother of T.K., and D.C., the sister of T.K., which contained references to uncharged prior criminal conduct of appellant. The trial court has thoroughly addressed and properly rejected each of the contentions of appellant relating to the audiotape and we more purposefully refrain from elaboration on that analysis.

Finally, appellant contends that he is entitled to a new trial as a result of false answers provided during *voir dire* by juror Snyder, a member of the petit jury. During *voir dire*, the trial court asked the entire venire panel whether "any of you or members of your family or close personal friends have had any experience relating to allegations of child molestation, either as a victim or a witness or an accused?" Juror numbers 22, 28, 32, 35 and 43 all responded affirmatively and further *voir dire* of those venirepersons was conducted *in camera*. Notably, juror Snyder did not raise his hand in response to this inquiry and, at the time of the inquiry. Juror Snyder was seated as an alternate juror, but during trial, replaced another juror on the petit jury who was excused for personal reasons.

(Cont'd)

(1983). *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L. Ed. 2d 1193 (1982) . Further, the grant or denial of a continuance to secure a witness is a matter within the sound discretion of the trial court and will not be reversed in the absence of prejudice or a showing of palpable and manifest abuse of discretion. *Commonwealth v. Sullivan*, 484 Pa. 130, 398 A.2d 978 (1979).

Commonwealth v. Williams, 537 Pa. 1, __, 640 A.2d 1251, 1260 (1994).

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Appellant now contends that interviews of jurors following the conviction of appellant reveal that the wife and sister-in-law of juror Snyder were sexually abused as children and that not only was this not revealed during *voir dire*, but that juror Snyder argued during jury deliberations that, based on his experience, the failure of T.K. to come forward immediately is typical of young sexual abuse victims. This failure to answer truthfully during *voir dire*, according to appellant, was prejudicial since the defense strategy centered on attacking the credibility of T.K. in light of her failure to come forward and report the abuse promptly. Appellant supports these contentions with (1) the affidavit of a private investigator who interviewed juror Snyder, and (2) written transcripts of telephone interviews of two other jurors conducted by the same private investigator.

We are unable to agree with appellant that the present record is alone sufficient to warrant vacating the judgment of conviction and remanding for a new trial. Appellant, in asserting that a new trial is warranted, relies on our holding in *Commonwealth v. Rosario,* 198 Pa.Super. 177, 182 A.2d 75 (1962): .

> Here, under the uncontradicted statement of defense counsel and the assumption of the trial judge, incorrect answers to clear questions misled counsel, without any fault or neglect an his part, and this prevented an intelligent exercise of the defendant's right of peremptory challenge. This being so, we cannot speculate as to whether the defendant was harmed in fact by this deprivation of his right.

Commonwealth v. Rosario, supra at __ 182 A.2d at 76. *Rosario,* however, is distinguishable from the instant case since both jurors in *Rosario* actually responded in the negative to a question to

which they unambiguously fell within the class of potential jurors sought to be detected. Instantly, the question posed did not require a negative answer, but only asked panel members to raise their hands if they felt they fell within the group defined by the question. As the trial court points out:

> [I]t may not be assumed that his failure to disclose his personal experience amounted to an incorrect answer to a clear question. According to the defendant, the juror's wife and her sister were molested when they were close to [T.K.'s] age. This means that the molestation would have occurred approximately fifty years ago, given the age of the juror in question. Further, the question posed during voir dire concerned "allegations of child molestation." Given the setting in which this question was asked, the juror could have interpreted "allegations" as referring to specific criminal charges.

Accordingly, we are constrained to remand to the trial court for a hearing to determine whether juror Snyder knowingly failed to respond to the inquiry during *voir dire*.[4] Absent such knowing deceit, the trial court may conclude that juror Snyder was unbiased and able to render a verdict according to the evidence, *Commonwealth v. Reiss*, 440 Pa.Super. 151, 655 A.2d 163 (1995), *allo. granted*, __ Pa. __, 664 A.2d 974 (1995), and that his presence on the petit jury was due to a combination of fortuity

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4. We are, of course, quite mindful of the concern for the privacy of jurors so artfully expressed by the trial court. *See: Commonwealth v. Gibson*, 389 Pa.Super. 518, __, 567 A.2d 724, 733 (1989). Accordingly, the trial court and attorneys, on remand, must be especially careful to safeguard the privacy of jurors whose detached insight and dedication plays such a significant role in our criminal justice system.

and the imprecise or ambiguous nature of inquiries framed by counsel during *voir dire.*

Once the possibility of a knowing deceit has been eliminated, appellant may not be permitted to attack the verdict reached by the jury by introducing evidence of discussion which took place during deliberations. Such evidence is not only inadmissible as an invasion of the province of the jury, *Carter v. U.S. Steel Co.*, 529 Pa. 409, 604 A.2d 1010, 1013-14 (1992), *cert. denied*, 506 U.S. 864, 113 S.Ct. 186, 453 121 L.Ed.2d 130 (1992); *Commonwealth v. Pierce*, 453 Pa. 319, __, 309 A.2d 371, 372 (1973), but would demonstrate little more than juror Snyder's analysis of the conduct of T.K. and conveyance of that analysis to other jurors. Such expression during deliberation is quotidian, since it is clear that, despite the best efforts of counsel during *voir dire*, a fair juror, nonetheless, brings untold life experiences to the jury process. In 1936, Clarence Darrow explained:

> Choosing jurors is always a delicate task. The more a lawyer knows of life, human nature, psychology, and the reactions of the human emotions, the better he is equipped for the subtle selection of his so-called 'twelve men, good and true.' *In this undertaking, everything pertaining to the Prospective juror needs to be questioned and weighted: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man;* all of these qualities and experiences have left their effect on ideas, beliefs and fancings that inhabit his mind.

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Commonwealth v. Gibson, 389 Pa.Super. 518, __, 567 A.2d 724, 736 (1989), *quoting* Darrow, "Attorney for the Defense: How to Pick a Jury," *Esquire Magazine* (May 1936), *reprinted* in Darrow, *Verdicts Out of Court,* at 311-24 (1963) (emphasis in original) Accordingly, on remand, appellant may present evidence on the limited issue of whether juror Snyder acted with *scienter* in failing to respond to the inquiry posed during *voir dire.*

Judgment of sentence affirmed. Case remanded for an evidentiary hearing consistent with this Memorandum. Jurisdiction relinquished.

APPENDIX F — OPINION OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION, DATED FEBRUARY 9, 1996

'N THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

NO. 1438-94

COMMONWEALTH OF PENNSYLVANIA

VS.

ROBERT HUNTER

February 9, 1996

OPINION

On June 9, 1995, the defendant was convicted of two counts of Involuntary Deviate Sexual Intercourse, three counts of Indecent Assault, three counts of Corruption of a Minor and three counts of Endangering the Welfare of Children. These convictions followed a jury trial. On September 27, 1995, the defendant was sentenced to serve a total of 8 to 16 years at a State Correctional Institution. He now appeals these convictions on various grounds.

FACTS

The defendant's convictions stemmed from specific incidents involving himself and Tara Kelly. On February 4, 1994, Miss Kelly filed a complaint against the defendant alleging that he had sexually

assaulted her on a number of occasions between 1988 and 1994. Tara Kelly recalled three of these instances specifically: September 11, 1993, December 25, 1993 and January 14, 1994. At the time she made the complaint, Miss Kelly was eleven years old. The defendant had been romantically involved with Miss Kelly's mother, JoAnn Kelly, for a number of years. An investigation into these charges was initiated by the Montgomery County Detective Bureau. This included an electronic interception of a conversation between the defendant and JoAnn Kelly on February 6, 1994. (JoAnn Kelly consented to the interception which took place inside of her home. Her sister, Donna Ciampitti, was also present on that day). The defendant was arrested on February 9, 1994 and subsequently held over for trial.

At the trial, the Commonwealth presented a great deal of evidence in the form of witness testimony. This included testimony by Lauren Brown, a young friend of Tara Kelly's who recalled the evening when Tara first related the defendant's misconduct. Dr. Allan Dejong, a pediatrician specializing in child sexual abuse, offered an expert opinion that Tara Kelly's physical condition was consistent with the type of sexual contact she had described. He went on to conclude, however, that her condition was non-specific, as it could have been caused by other factors as well. (N.T. 5/30/95, p. 396). JoAnn Kelly testified in detail about her relationship with the defendant, and was extensively cross examined about her own personal life and motivations with respect to this case.[1] The most probative evidence, however, came through

1. A brief background summary may be useful as the facts surrounding this case are somewhat complex. At the time the allegations of sexual abuse were made against him, the defendant was the subject of a Securities and Exchange Commission (SEC) investigation. The SEC probe concerned the defendant's possible use of insider information with regard to a bank stock transaction. John Heffernan was one of the SEC agents investigating the

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the testimony of Tara Kelly; along with the audiotape of the aforementioned intercepted conversation between JoAnn Kelly and the defendant.

Tara Kelly testified during her direct examination that the defendant had been sexually molesting her from the time she was in first or second grade. The first episode occurred in a swimming pool in Florida. From that occasion until the time of her disclosure, Tara testified that the defendant had touched and licked her breasts and vagina, had made her touch his penis and put his penis in her mouth. (N.T. 6/6/95, p.766). Tara could not be specific as to the number of times the defendant sexually assaulted her. She did testify that the molestations took place at the defendant's homes in Huntington Valley, Pennsylvania, Stuart, Florida and Stone Harbor, New Jersey. The three episodes about which Tara testified in detail, and for which the defendant was charged, occurred at the home in Huntington Valley. Tara testified that on September 11, 1993, the defendant came into the master bedroom where she was watching television. He told her to take off her clothes, whereupon he touched her vagina. As far as she knew, she and the defendant were alone in the house because her

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defendant. Mr. Heffernan questioned JoAnn Kelly as part of the investigation. He later became romantically involved with Ms. Kelly and they were eventually married. Mr. Heffernan was removed from the case involving the defendant when his relationship with Ms. Kelly was disclosed.

Further, JoAnn Kelly filed a civil lawsuit against the defendant on behalf of herself and Tara Kelly in Delaware County. The suit covered the same allegations first raised in the criminal complaint and set damages in excess of three million dollars. At the criminal trial, the defendant argued that the charges against him were part of a scheme concocted by JoAnn Kelly and John Heffernan. The defendant contended that they coerced Tara Kelly into making these allegations in order to extort a large sum of money from him.

mother had left earlier to attend a wedding. (N.T. 6/6/95, p.771). The second episode occurred on Christmas Day, 1993. Tara testified that on that evening she went into the room where the defendant kept his desk in order to retrieve a Christmas card for her mother, who had already gone to bed. The defendant came in behind her and shut the door. He told her that if she did not put his penis in her mouth, he would not wish her mother a Merry Christmas or give her a card. Tara testified that she complied, and after this assault the defendant gave her money to put in the card for her mother. The final episode of molestation occurred on January 14, 1994. Tara testified that she and her friend Maureen Murray were spending the night at the defendant's home. The next day, they were all to fly to Florida for a vacation. Tara asked the defendant if they could go to Bertucci's, her favorite restaurant, for dinner that evening. The defendant told her to follow him into his room. Once they were in his room, the defendant took Tara into his bathroom and told her that if she did not put his penis into her mouth, he would not take she and her friend to the restaurant. Tara testified that she once again complied with the defendant's demand.

When asked why she waited so long before coming forward, Tara stated that she was afraid that her mother would not believe her and be angry. She was also concerned that her mother would have to return to her job as a waitress. Additionally, Tara testified that, despite the consequences, she decided that she did not want the abuse by the defendant to continue. She finally told her friends Maureen and Lauren during a slumber party. (N.T. 6/6/95, p.777) The two girls corroborated this account through their own testimony.

The audiotape of the intercepted conversation offered as evidence at the trial also served to prove the allegations made by

Tara Kelly. The tape was recorded on February 6, 1994 by Detective Joseph Ryan of the Delaware County Detective Bureau and Katherine Hart of the Montgomery County Detective Bureau. The audiotape contained a recording of a conversation the defendant had with JoAnn Kelly and her sister, Donna Ciampitti. The defendant made certain admissions that, while not addressing the specific instances described by Tara Kelly, did infer a strong likelihood of sexual misconduct with the girl. (See Commonwealth's Exhibit #17, Transcription of Audiotape Recording).

ANALYSIS

The defendant initially alleges that the voir dire process was tainted by a juror's failure to disclose a family member's alleged personal experience involving child molestation. The defendant argues that this fact prevented the juror from being stricken for cause or through a peremptory challenge; which, in turn, allowed the juror to taint other jurors during deliberations. For this reason, the defendant contends that a new trial is warranted. We disagree.

The allegations of juror misconduct first came to light through an affidavit submitted to the Court by Russell Kolins. Mr. Kolins, a private investigator employed by the defendant, was an integral member of the defense team who was present in court at all stages of these lengthy proceedings. Mr. Kolins apparently began an investigation immediately after return of the unfavorable verdict. He commenced an inquisition of the former jurors at their homes following the trial. There has been no independent evidence offered to corroborate these allegations. The juror in question has never communicated with this Court and no signed statement from the juror has ever been obtained. Comments from other jurors, if actually made to the defense investigator, are hearsay and thus

clearly inadmissable. The defendant subsequently requested an evidentiary hearing to question the juror, post-verdict, regarding the alleged misconduct. This Court denied the request as absolutely improper under the circumstances.

The Court of Appeals for the Third Circuit addressed this issue in ***United States v. Gilsenan***, 949 F.2d 90, (3rd Cir. 1991). In ***Gilsenan***, the Court recognized the serious problems inherent in granting such hearings:

> In reaching our result we recognize that sometimes judges are tempted to order hearings to put matters to rest even if not strictly required. After all, a call for a hearing has an inherently reasonable ring to it. But this is not one of those circumstances, for there are compelling reasons not to hold a hearing involving the recalling of discharged jurors. ***Gilsenan,*** 949 F.2d at 97.

The Court in ***Gilsenan*** went on to quote from an opinion by the Court Appeals for the Second Circuit, which articulated many of these compelling reasons:

> We are always reluctant to 'haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.' As we have said before, post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts. ***Gilsenan,*** 949 F.2d at 97 *citing* ***United States v. Ianniello,*** 866 F.2d 540, 543 (2d Cir.1989) (citations omitted).

This sentiment was echoed by the Pennsylvania Supreme Court in ***Carter v. U.S. Steel Corp.***, 604 A.2d 1010 (Pa. 1992) In ***Carter***, the Court held that in order to protect the sanctity of the jury room, a juror may only testify to the existence of outside influence, but not as to the effect this outside influence may have on deliberations. ***Carter***, 604 A.2d at 1013 citing ***Pittsburgh National Bank v. Mutual Life Insurance Company*** 425 A.2d 383 (Pa. 1981). This holding mirrors Federal Rule of Evidence 606(b), which states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Examples of this type of extraneous information would include attempts to bribe jurors or exposure to media accounts during the trial. In ***United States v. Resko,*** 3 F.3d 684 3rd Cir. 1993), the Court of Appeals for the Third Circuit defined prejudicial extraneous influences and their effect on the jury process: "It has long been recognized that when jurors are influenced by the media and other publicity, or when they engage in communications with third parties, these extra-record influences

pose a substantial threat to the fairness of the criminal proceeding because the extraneous information completely evades the safeguards of the judicial process." ***Resko*** 3 F.3d at 690. Allegations of the kind of juror misconduct outlined in ***Resko*** have never been raised in this case. Therefore, the alleged personal experiences of the juror, even if related to other jurors, is not extraneous prejudicial information subject to post-verdict inquiry as contemplated by the applicable facts and law.

The defendant wants a hearing held so the juror in question can be subpoenaed to testify. This juror was willing to serve for nearly two weeks in a difficult trial involving the decidedly unpleasant issue of child molestation. This Court is not going to subject the juror to further proceedings so the defense can go on a fishing expedition based on hearsay statements allegedly obtained by the defendant's private investigator. To bring a juror back for questioning in a court hearing would have disastrous consequences upon the judicial system. This Court would be very reluctant to do that under any circumstances. Clearly, this case does not warrant such extraordinary action based upon the flimsy evidence presented by the defendant.

The Court finds no merit in the defendant's contention that the voir dire process was tainted by the juror's alleged omission. Specifically, the defendant claims that during voir dire the jury panel was asked if they or members of their family or close personal friends had any experience relating to allegations of child molestation as a victim, witness or accused? (N.T. 5/30/95, p.127). According to the defendant, the juror in question concealed his personal experiences and later used these experiences to taint other jurors during deliberations. It was only when questioned by the private investigator, according to the defendant, that the juror broke down in tears and admitted that his wife had revealed

to him that she and her sister had been sexually assaulted by their father when they were children.

This version was presented through the affidavit of the defense investigator, an obviously biased source. There has been no corroboration of this account by the juror in question, nor any other evidence presented to this Court to bolster this claim. Further, even if the juror had this particular personal experience with sexual abuse and had not answered the voir dire question in the affirmative, it does not prove that the defendant was prejudiced during voir dire and therefore deserves a new trial.

The defendant relies on ***Commonwealth v. Rosario,*** 182 A.2d 75 (Pa. Super. 1962) for this proposition, but the facts in that case are clearly distinguishable from the case at bar. In ***Rosario***, the jury panel was asked whether any of them were related to law enforcement officers and everyone answered in the negative. It came to light after the trial that two of the jurors were, in fact, the parents of Pennsylvania State Troopers. The Superior Court, in a 2 to 1 decision, ordered a new trial in ***Rosario*** because, "incorrect answers to clear questions . . . prevented an intelligent exercise of the defendant's right of peremptory challenge" ***Rosario,*** 182 A.2d at 77. Assuming the defendant's allegation is true, it still may not be assumed that his failure to disclose his personal experience amounted to an incorrect answer to a clear question. According to the defendant, the juror's wife and her sister were molested when they were close to Tara Kelly's age. This means that the molestation would have occurred approximately fifty years ago, given the age of the juror in question. Further, the question posed during voir dire concerned "allegations of child molestation". Given the setting in which this question was asked, the juror could have interpreted "allegations" as referring to specific criminal charges. Given the remoteness of

the alleged incident and the ambiguous nature of the voir dire question, this Court finds that the holding in ***Rosario*** is not controlling in this case.

It should be noted further that there is no allegation made against the juror which would rise to the level of a challenge for cause. The jury panel, including the juror in question, was voir dired on whether there was any reason they could not be fair and impartial in this case knowing that it involved allegations of child abuse. (N.T.-5/30/95, p.8-9). There is no indication that the juror could not be fair and impartial, therefore, a challenge for cause would be rejected. ***Commonwealth v. Shirey,*** 481 A.2d 1314,132 5 (Pa.Super. 1984). Under the totality of circumstances, it is the Court's determination that the defendant's allegation of juror misconduct does not warrant further inquiry, let alone a new trial.

The defendant argues that the admission of evidence pertaining to uncharged incidents of sexual assault involving himself and Tara Kelly amounted to reversible error. Specifically, the defendant claims the Court erred in overruling his objection to the admission of the aforementioned audiotape as it made reference to an uncharged incident occurring in Florida. The defendant further asserts that the Commonwealth committed prosecutorial misconduct by alluding to these incidents during closing speeches, in violation of an order by the Court. An alleged, "no objections" rule during closing arguments by this Court, precluded the defendant from objecting to the Commonwealth's actions. Finally, the defendant argues that the Court's instruction to the jury, with respect to consideration of evidence of uncharged conduct, was insufficient to cure the prejudicial effect of its admission. A review of the record, along with the Court's own recollection, leads to a different conclusion with respect to this issue.

Appendix F

On May 26, 1995, the defendant filed a Motion in Limine to preclude admission of any evidence of uncharged prior bad acts the defendant allegedly committed on or with the complainant. This would obviously include the references on the audiotape. During a pre-trial meeting in chambers, the parties agreed that the Commonwealth would limit the charges against the defendant to those arising from incidents occurring on September 11, 1993, December 25, 1993 and January 14, 1994; and that evidence in regard to the alleged sexual course of conduct between the parties would be unlimited. The Commonwealth would not charge the defendant with criminal offenses based on allegations by Tara Kelly that the defendant had molested her on numerous other occasions during the previous five years. These allegations included an incident occurring in Florida, which was discussed by the defendant and JoAnn Kelly on the audiotape. As part of this agreement, the defendant withdrew the Motion in Limine. Thus, the Court never heard argument, nor made a ruling on the merits of this issue. It is important to note that the agreement did not preclude the Commonwealth from introducing evidence of these allegations as part of a continuing course of conduct on the part of the defendant.

In fact, the admission of evidence concerning other incidents of molestation spanning those five years became a cornerstone of the defendant's trial strategy. Attacking the credibility of these allegations would serve to call into question the validity of the charges against the defendant. Successfully challenging these allegations would also add substance to the defense that Tara Kelly was put up to making these charges by JoAnn Kelly and John Heffernan in an effort to extort money from the defendant. This strategy is evidenced through the cross examination of Tara Kelly:

Appendix F

Q. And then you said the first time that Bob did anything to you was in Florida; is that right?

A. Yes. (N.T. 6/6/95, p.800)

Q. Is there any reason why you didn't tell your dad about what was going on?

A. He found out after I told my mom.

Q. I understand that. You are saying that this took place over five years ago and continued all during the time you were sending all these birthday cards and love letters to Bob that this was what was happening, right?

A. Yes. (N.T. 6/6/95, p.801)

Tara was questioned extensively about the aforementioned birthday cards and love letters and they were shown to the jury. The implication being that a child being abused in such a manner for so long would never send such cards. The cross examination is replete with references to the uncharged incidents of molestation as a means to prove that Tara was never molested.

The defendant also introduced the expert testimony of Dr. Marvin Krane, a physician specializing in obstetrics, gynecology and oncology. Dr. Krane testified that, in his opinion, if this type of molestation had been going on for five years, there would have been some objective manifestations of the abuse in the vaginal area of the victim. (N.T. 6/8/95, p.1300-01). There was also evidence presented that Tara was an above average student during the time the abuse was taking place, inferring that the schoolwork of a child in this predicament would suffer.

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After the cross examination of Tara took place, which included a reference to Florida, the defendant objected to the admission of the audiotape on relevancy and hearsay grounds. Specifically, the defendant objected to an inculpatory remark with regard to an incident that had also occurred in Florida. During the ensuing colloquy, the Court reiterated its understanding that the parties, by mutual agreement, were given wide latitude in their presentation of course of conduct evidence. The objection was thus overruled and the audiotape was admitted. (N.T. 6/7/95, p.933-37).

An appeal of this ruling finds the defendant wishing to have a double standard applied to the admission of the course of conduct evidence. The defendant is arguing, in effect, that the Court should allow this type of evidence (including evidence of molestations in other jurisdictions) when it is used to attack the victim's credibility and the Commonwealth's case. However, this same course of conduct evidence should be barred if it is to be introduced by the Commonwealth and puts the defendant in a bad light. The defendant simply cannot have it both ways. The agreement of the parties and the interests of justice preclude this Court from applying such a standard.

The Court addressed the course of conduct evidence during closing instructions to the jury. Specifically, the Court advised:

> You have heard evidence of other allegations of contact between Tara Kelly and the defendant on various other dates and in other jurisdictions. For purposes of your verdicts in this case, you must be convinced beyond a reasonable doubt that the specific acts constituting the alleged criminal offense occurred on the dates alleged, September 11th, 1993, December

25th, 1993 and January 14th, 1994. (N.T. 6/9/95, p.1356).

It is the Court's determination that this instruction adequately placed the course of conduct evidence in its proper context with respect to the charges levied against the defendant. Therefore, any alleged prejudice to the defendant was thus cured.

The claim by the defendant that this Court imposed a "no objections" rule during closing arguments is simply inaccurate and finds no support on the record. The Court made no such ruling. Furthermore, there is no objection to this alleged ruling contained within the record.

The defendant's assertion that the Commonwealth committed prosecutorial misconduct by referring to the course of conduct evidence during closing argument has no merit. There was no objection made by the defendant, thus the issue is waived on appeal. ***Commonwealth v. Leymaster,*** 428 A.2d 176: 178 (Pa.Super. 1981). Moreover, there was no prosecutorial misconduct. In general, evidence of other wrongful conduct not charged in the information on which the defendant is being tried is inadmissible at trial except in certain limited circumstances. ***Commonwealth v. Knowles,*** 637 A.2d 331 (Pa.Super. 1994) *citing* ***Commonwealth v. Kramer,*** 566 A.2d 882 at 884 (Pa. Super. 1989). Evidence of prior sexual relations between defendant and his or her victim is admissible to show a passion or propensity for illicit sexual relations with the victim. ***Knowles,*** 637 A.2d at 333 *citing* ***Kramer***, 566 A.2d at 844. In the case at bar, the Commonwealth introduced evidence of prior sexual relations through the testimony of Tara Kelly and the aforementioned audiotape. It was presented pursuant to an agreement by the parties that such evidence would only be used to infer a course

of conduct. The Commonwealth agreed to limit the chargeable offenses to incidents occurring on September 11, 1993, December 25, 1993 and January 14, 1994. (N.T. 6/7/95, p.934). Contrary to the defendant's assertion, there was no such unambiguous order by this Court precluding the Commonwealth from introducing this evidence at the trial. In fact, the defendant withdrew the Motion in Limine which referenced this evidence in accordance with his trial strategy. This Court has determined that the evidence of prior sexual relations between the defendant and Tara Kelly was properly admitted pursuant to the agreement of counsel and under the prevailing case law in Pennsylvania. Thus, the references to this evidence during the Commonwealth's closing argument were proper.

The defendant next argues that the Court's admission of the audiotape over objections constituted reversible error. This issue was thoroughly adjudicated through the defendant's Motion to Suppress. For this reason, we will simply reiterate our ruling on that Motion.

The interception of communications is permitted in certain situations under 18 PaC.S.A. §5704. This includes one party consensual interceptions governed by § 5704(2)(ii), which states in relevant part:

> It shall not be unlawful under this chapter for:
>
> (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire, electronic or oral communication involving suspected criminal activities where: . . .

> (ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless . . . the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception;

The Pennsylvania Superior Court delineated the requirements of 18 PaC.S.A. § 704(2)(ii) in ***Commonwealth v. Phillips***, 540 A.2d 933 (Pa. Super. 1988). In ***Phillips***, an informant consented to wear a wire during an attempted drug buy with the Appellant; subsequently incriminating statements made by the Appellant were intercepted and used against him at trial. The Appellant argued that the intercepted communications should be suppressed because a court order was not obtained as required by 18 PaC.S.A. §5708-12. The Superior Court disagreed, holding that the informant was a party to the communication and voluntarily consented to wearing the body wire and therefore no court order was necessary under the statute. The Court went on to state that 18 PaC.S.A. § 5704 contains its own authorization requirements which supplant those found in 18 PaC.S.A. §5708 et seq. ***Phillips***, 540 A.2d at 934-35. Finally, the Court in ***Phillips*** held that 18 PaC.S.A. §5704(2)(ii) incorporated a reasonable grounds standard. Thus, the police must be able to articulate reasonable grounds for monitoring; then the Attorney General or (assistant) district attorney must find that in fact those reasonable grounds do exist. Thus, the statute itself imposes a double check against unreasonable seizures of a person's conversations. ***Phillips***, 540 A.2d at 937.

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We find that the Commonwealth has met all of the requirements of the Wiretap Act in the instant case. JoAnn Kelly voluntarily consented to having her conversations with the defendant intercepted; therefore, the requirements of 18 PaC.S.A. §5709(3)vii & §5710(4) are not, despite the defendant's vehement assertions, applicable under ***Phillips***. The focus of inquiry rests exclusively on the provisions contained within 18 PaC.S.A. §5704(2)(ii).

The evidence presented at the suppression hearing has convinced this Court that there were reasonable grounds to conduct an interception of communications between JoAnn Kelly and the defendant. The Detectives established these grounds through interviews with the victim and her mother. They then articulated these grounds to ADA Kelly, who appropriately authorized the intercept after a full review of the matter.

The defendant further contends that the audiotape should be suppressed due to its inaudibility. In ***Commonwealth v. Leveille,*** 433 A.2d 50 (Pa. Super. 1981), the Superior Court adopted the ruling by the Rhode Island Supreme Court in ***State v. Donato,*** 414 A.2d 797 (R.I.) The Rhode Island Court, incorporating the findings of a number of jurisdictions, held that sound recordings of imperfect quality or partial inaudibility will be admissible unless the inaudible portions or omissions are so substantial as to render the recording as a whole untrustworthy. The Court in ***Donato*** held further that the admissibility of such recordings should be left to the sound discretion of the trial court. ***Leveille*** 433 A.2d at 52. The Court had no difficulty understanding the conversation recorded on the audiotape during a review for the Suppression hearing. Further, there was no indication that the jury had any problems with comprehension when the audiotape was played in open court. After listening to the recording in question, this Court

finds that it was properly admitted under the standard articulated in ***Leveille.*** (See Court's May 24, 1995 Ruling on Motion to Suppress).

The defendant claims that the Commonwealth's use of the term "pedophile", (N.T. 6/9/95, p.113&124) when describing the defendant during closing arguments was so prejudicial as to warrant a new trial. As there was no objection made by the defendant, the Court is of the opinion that this issue has been waived pursuant to the holding in ***Commonwealth v. Leymaster,*** (See Infra) but will once again address the merits for the record.

The initial determination of whether the prosecutor has exceeded the bounds of "oratorical flair" is for the trial judge. In its review, the appellate court is limited to determining whether the trial court abused its discretion. ***Commonwealth v. Novasak,*** 606 A.2d 477, 480 (Pa.Super. 1992) *citing* ***Commonwealth v. D'Amato,*** 526 A.2d 300, 309-10 (Pa. 1987). A new trial is required only in those instances where the language of the prosecutor is such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict. ***Novasak***, 606 A.2d at 480 *citing* ***Commonwealth v. Johnson,*** 533 A.2d at 997 (Pa. 1987). The prejudicial effect of the remarks must be evaluated in the context in which they occurred. ***Commonwealth v. Green*** 581 A.2d 544 (Pa.Super. 1990). Comments do not support a finding of reversible error because they are a fair inference from evidence to which the assistant district attorney makes reference. ***Novasak*** 606 A.2d at 481.

Taken in context, the Commonwealth's use of the term "pedophile" during closing argument was not so prejudicial as to

mandate a new trial. The initial use was a general description of modus operandi: "That's how a pedophile controls the object of his lust, control and love and affection." (N.T. 6/9/95, p. 113). In the second instance, the Commonwealth used the term to punctuate the end of their closing argument: "If you look at the evidence and see how things developed, I have no doubt that you will do the right thing. That man is guilty. That man is a pedophile and should be convicted of these charges." (N.T. 6/9/95, p. 121). During the trial, the Commonwealth presented evidence to prove that the defendant sexually molested a young girl. Thus, use of the term it "pedophile", a synonym for child molester, was a fair inference from the evidence presented. It is not as if the Commonwealth used a derogatory term to refer to the defendant which had absolutely no connection to the charges against him. Further, this Court instructed the jury that the arguments of counsel are not evidence nor the law to be followed during deliberations; nor was the jury required to accept the arguments of either lawyer. (N.T. 6/9/95, p.1341-42). Finally, the Pennsylvania Superior Court has consistently held that not every intemperate or uncalled for remark by the prosecutor requires a new trial. ***Novasak***, 606 A.2d at 480. (citations omitted). Upon consideration of all of the foregoing factors, it is the Court's determination that the Commonwealth's use of the term "pedophile" during closing argument does not require a new trial.

The defendant next argues that the Court's refusal to instruct the jury on the law of res judicata was improper. The defendant refers here to the request to address in closing jury instructions, the aforementioned civil lawsuit filed by JoAnn Kelly in Delaware County. The defendant wanted the jury to be aware of the fact that a guilty verdict on the criminal charges would bring an automatic finding of civil liability under the principles of res judicata. Pennsylvania Rule of Criminal Procedure 1119 (a) states:

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> Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests. The trial judge shall charge the jury after the arguments are completed.

The request for the instruction in this case was made orally after the jury had been excused to deliberate. (N.T. 6/9/95, p.1365-69). The request therefore was not in compliance with the Rule, making this issue moot. Nevertheless, the Court feels obliged to address the question on the merits.

The trial judge is not required to grant a requested point for charge, so long as the charge given sufficiently states the pertinent law. ***Commonwealth v. Donahue,*** 630 A.2d 1238, 1247 (Pa.Super. 1993), *allocatur denied,* 645 A.2d 1316 (Pa. 1994). So long as the trial court's jury charge fully and adequately explains the relevant legal principles which to apply to the evidence presented at trial, the charge is correct and will be upheld on appeal. ***Commonwealth v. Donahue,*** 640 A.2d 1336,1344 (Pa. Super. 1994). The jury instruction request in this case was initiated as a means of putting before the jury the defendant's assertion that the criminal charges were concocted to extort money from him. (N.T. 6/9/95, p.1368-69). This Court determined that the principles of res judicata held little probative value and were far removed from the central issue of the defendant's guilt or innocence with respect to the charges levied against him. The Court is satisfied that the charge given to the jury covered all of the relevant aspects of the law in this case.

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Finally, the defendant claims that the Court's refusal to allow him to impeach prosecution witness Donna Ciampitti, through the testimony of Anthony Galiffa, constituted reversible error. A review of the record indicates that this allegation is incorrect. The defendant attempted to impeach Donna Ciampitti many times during cross examination without obstruction by the Court. (N.T. 6/5/95, p.496-526). Objections to questions designed to impeach this witness were sustained only when the subject matter of the inquiries were far afield from the matter before the Court. The testimony of Mr. Galiffa would certainly fall into this category. Given the totality of circumstances, the Court has determined that the defendant was afforded ample opportunity to impeach this witness on matters relevant to this case.

CONCLUSION

The defendant was found guilty of committing heinous sexual offenses. The fact that an eleven year old was the victim makes the perpetration of these crimes even more despicable. Children are society's most vulnerable members, and as such, must be protected by our legal system. After careful consideration of the defendant's claims on appeal, the Court is of the opinion that the verdicts against him should not be disturbed.

BY THE COURT

s/ Bernard A. Moore
J.

CC: Mary MacNeil Killinger, Esquire, ADA
Bruce Castor, Jr., Esquire ADA
Gavin P. Lentz, Esquire